

Supreme Court of the United States

OCTOBER TERM, 1969

No. 788

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES, AND EVERETT T. CARPENTER, POST-
MASTER OF THE CITY OF LOS ANGELES, STATE OF
CALIFORNIA,

Appellants,

—v.—

TONY RIZZI, D/B/A THE MAIL BOX

No. 812

UNITED STATES OF AMERICA AND THE
POSTMASTER GENERAL,

Appellants,

—v.—

THE BOOK BIN

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR
THE CENTRAL DISTRICT OF CALIFORNIA AND THE NORTHERN
DISTRICT OF GEORGIA, RESPECTIVELY

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IN THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/ 9/69	Fld complt for injnctn and declar relief to restrain the defts from interfering with pltf's mail pur to 39 USC 4006. Issd summs—Md JS-5. Fld memo of pts and authors in support of applic for prelim injnctn and for Three-Judge Court. Fld OSC retnble 1/20/69, 10am why prelim injnctn should not issue etc and TRO.
1/23/69	Fld notification and certificate of Judge Real—re "this challenge requires the formation of a Dist Court of Three Judges, etc. (R)
1/27/69	Hrg on OSC re TRO: Court directs the Government to hold mail presently in their custody. Gov-ernment to prepare order.
*1/20/69	TRO contd in force & effect until 1/27/69, 10am and for fur hrg at that time. Applicn for 3 judge ct not opposed.
1/29/69	Fld Order (R) re preliminary injunction and granting application for 3-Judge court.
2/ 6/69	Fld summs—ret'd svd as to all defts.
3/11/69	Fld Deft's ANSWER to complt.
3/26/69	Fld & mld notes plcg on cal 4/10/69. 10am for hrg re prelim Injctn by 3-Judge Court, purs to 28 USC 2284.
4/ 2/69	Fld defs memo in oppstn of application for prelim injnctn. (Copies to 3 Judges.

DATE	PROCEEDINGS
4/10/69	Hrg on appl for prelim inj fld 1/9/69 & ord cause stand submitted.
6/10/69	Fld plf's memo opinion & ord. Cpys mld.
6/23/69	LODGED Plf's Proposed findgs of fact & Concls of law. LODGED Plf's Proposed Jdgmnt.
8/ 1/69	Fld finds of fact & concl of law: Fld jdgmnt & ord thereon that deft's, etc vacate ord No. 68-103 of 12/31/68, dlvr to pltf all mail addressed to pltf, etc & refrain from any prcdngs, acts, etc enforcing the provs of 39 USC 4006 agnst pltf. (Ent 8/1/69 ntfld prtys). JS-6
8/13/69	Fld motn for stay of judgment pending appeal; and affid.
8/18/69	Fld plf's oppos to ex parte motn for stay of jdgmnt pendg appeal & motn to require def's to deliver forthwith to pltf all mail addressed to pltf being held by def's & affid. Copies to Judge Carr, Real & mld cpy to Judge Hufstedler.
8/20/69	Fld ORDER Jdgmnt entered 8-1-69, Stayed until 9-10-69, pending Appeal. (CC) (Judge Hufstedler).
9/ 2/69	Fld Deft's NOTICE OF APPEAL, with proof of Service. Cy to (R) (CC) and Judge Hufstedler. Fld deft's Request to Clerk to Certify Record on appeal and provide for its transmission to the Supreme Court.
9/26/69	Fld def's Ex Parte Motn for stay of Jdgmnt Pendg Appeal & affid of Larry L. Dier, Fld Ord (R) staying jdgmnt until becoming final after appeal.

In the United States Supreme Court

- 3/ 2/70 Order of the Supreme Court noting probable jurisdiction and placing case on summary calendar.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

TONY RIZZI, doing business as THE MAIL BOX, PLAINTIFF

vs.

MARVIN WATSON, Postmaster General of the United States of America; and EVERETT T. CARPENTER, Postmaster of the City of Los Angeles, State of California, DEFENDANTS

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF
TO RESTRAIN THE DEFENDANTS FROM INTERFERING
WITH PLAINTIFF'S MAIL PURSUANT TO 39 U.S.C.
§ 4006

[Filed Jan. 9, 1969]

* * * *

PLAINTIFF ALLEGES:

I

The jurisdiction of this Court over this action is invoked under 39 United States Code § 4006, 5 United States Code § 5001 et. seq., and 28 United States Code § 1331.

The matter in controversy exceeds, exclusive of interest or costs, the sum of value of \$10,000.00, and arises under the Constitution and laws of the United States, and particularly under:

- (a) the First Amendment to the United States Constitution;
- (b) the Fifth Amendment to the United States Constitution;
- (c) the Sixth Amendment to the United States Constitution; and
- (d) the Seventh Amendment to the United States Constitution.

II

The jurisdiction of this Court is further invoked under 28 United States Code §§ 2201, 2202, 2282 and 2284.

III

Plaintiff TONY RIZZI, doing business as THE MAIL BOX, is engaged in distributing by mail publications, all of which are protected by the free speech and press provisions of the First Amendment to the United States Constitution. None of the publications distributed by him are obscene. His publications do not go substantially beyond customary limits of candor in describing sex or nudity, in the nation as a whole; they do not appeal to the prurient interest of the average person, in the nation as a whole; and they are not utterly without redeeming social importance.

IV

At all times herein mentioned, defendant MARVIN WATSON was the Postmaster General of the United States of America and defendant EVERETT T. CARPENTER was the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the receipt and distribution of materials sent through the United States mails for delivery in and from said City.

V

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

VI

The said Order was based upon a decision of the said Peter R. Rosenblatt dated December 31, 1968, as afore-said, in which he found that the magazines "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend" were obscene and were not constitutionally protected expression.

VII

In finding the said magazines to be obscene, as afore-said, Peter R. Rosenblatt, the Judicial Officer, applied standards which are contrary to those commanded by the First Amendment as the same has been interpreted by the United States Supreme Court and other courts of competent jurisdiction. The Judicial Officer also specifically refused to follow binding decisions of this Court, wherein (a) the Honorable Warren J. Ferguson found a large number of like magazines to be not obscene in *United States v. Three Packages, etc.*, Civil No. 68-25-F; (b) the Honorable Irving Hill found a large number of like magazines to be not obscene in *United States v. 80 Cartons of Magazines, etc.*, Civil No. 68-480-IH; (c) the Honorable Pierson M. Hall found a large number of single photographs to be not obscene in *United States v. Six (6) Parcels, etc.*, Civil No. 66-1129-PH; and (d) the Honorable Manuel L. Real found the publication "Female Photographers" to be not obscene in *United States v. Miller*, Civil Nos. 1842, 2166 and 2396. The Judicial Officer also refused to give any weight to the fact that the Post Office Department had itself granted second class mailing privileges to a large number of comparable magazines.

VIII

The order of the Judicial Officer is invalid and void for the following reasons:

(a) The finding of the Judicial Officer that the magazines in question are obscene is unsupported by any legal evidence. The Post Office Department witnesses who testified against the magazines involved

herein also testified that they found the magazines which the United States Supreme Court found not obscene in *Felton v. Pensacola*, 390 U.S. 340, 88 S.Ct. 1098, to be "objectionable" in the same respects that they found the magazines involved herein to be "objectionable".

(b) The finding of the Judicial Officer that the magazines in question are obscene is arbitrary, capricious, an abuse of discretion, and not in accordance with law. The magazines involved herein are legally indistinguishable from magazines found not obscene by courts of competent jurisdiction and magazines granted second class mailing privileges by the Post Office Department itself.

(c) The finding of the Judicial Officer that the magazines in question are obscene is based upon the utilization of standards which are directly contrary to those set forth by the United States Supreme Court.

(d) The conclusion by the Judicial Officer that the magazines in question are obscene is contrary to law and unsupported by any legal evidence.

(e) The witnesses upon whom the Judicial Officer relied were not qualified experts.

IX

Unless injunctive relief is granted by this Court, plaintiff will suffer great and irreparable injury for which he has no adequate remedy at law.

SECOND CAUSE OF ACTION

X

Plaintiff reincorporates and realleges Paragraphs I through IX, inclusive, of the first cause of action as though the same were herein fully set forth.

XI

The statute, 39 United States Code § 4006, on its face and as construed and applied herein, violates rights guar-

anteed to the plaintiff under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution in the following respects:

(a) The statute permits the Post Office Department to impose prior restraint upon the circulation of the press without assuring a judicial determination in an adversary proceeding within a specified brief time limit. The statute provides no assurance of prompt judicial determination, nor does the statute require the Post Office Department to initiate court proceedings justifying the restraint upon the circulation of the press and to bear the burden of proof in such court proceedings.

(b) The statute arbitrarily and capriciously authorizes the Post Office Department, an administrative agency, to suppress material as obscene without the protections of a judicial proceeding, including the right to a jury trial, the presumption that the challenged material is constitutionally protected, the requirement of proof of the essential elements of obscenity, the requirement of proof of scienter, and all of the other protections required in a judicial proceeding before the publications, which are prima facie protected by the guarantees of freedom of speech and press, may be suppressed.

(c) The statute, by reason of the vagueness and ambiguity of its language, the lack of ascertainable standards, the omission of any requirement of scienter, the vesting of unfettered discretion in an administrative agency to suppress speech and press as allegedly obscene, abridges the exercise of freedoms of speech and press and deprives plaintiff of liberty and property without due process of law.

(d) The statute arbitrarily and capriciously authorizes the Post Office Department to engage in invidious discrimination between material which the administrative agency deems obscene for subjective reasons and other comparable material held constitutionally protected by the courts or granted second

class mailing privileges by the Post Office Department itself, and the Post Office Department has engaged in said invidious discrimination with respect to the plaintiff herein and the material involved, all in violation of the due process and equal protection provisions of the Fifth Amendment to the United States Constitution.

XII

There is a bona fide and genuine dispute between the parties, consisting of the following:

(a) Plaintiff contends that the statute in question, 39 United States Code § 4006, on its face and as construed and applied, violates constitutional guarantees as set forth in Paragraph XI(a), (b), (c) and (d).

(b) Defendants contend that 39 United States Code § 4006 in question is in all respects valid and constitutional and specifically does not violate the constitutional guarantees as set forth in Paragraph XI(a), (b), (c) and (d).

WHEREFORE, Plaintiff prays:

1. That this Court issue a temporary injunction, preliminary injunction, and final injunction, restraining and enjoining defendants and each of them and their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from any threatened proceedings, proceedings, acts, or other conduct, enforcing the provisions of 39 United States Code § 4006 against plaintiff in relation to the books, magazines or advertisements distributed by plaintiff; from in any other manner, directly or indirectly, harassing or threatening plaintiff in the conduct of his business with respect to the sale or distribution of plaintiff's books, magazines and advertisements; and directing the defendants to vacate the order of the Judicial Officer of the Post Office Department (No. 68-103) executed on December 31, 1968; and to forward all mail addressed to plaintiff without interference.

2. That plaintiff have a judgment and decree of this Court declaring his rights and status, and more particularly adjudicating that:

(a) 39 United States Code § 4006, on its face and as construed and applied herein, violates rights guaranteed to the plaintiff under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution;

(b) 39 United States Code § 4006, on its face and as construed and applied, imposes a prior restraint upon the circulation of the press without assuring a prompt judicial determination and without requiring the Post Office Department to initiate court proceedings or to bear the burden of proof in such court proceedings with respect to the alleged non-mailability of the material;

(c) 39 United States Code § 4006, on its face and as construed and applied, arbitrarily and capriciously authorizes the Post Office Department to suppress material as obscene without the protections afforded judicial prosecutions, including the right to a jury trial, the presumption that the challenged material is constitutionally protected, the requirement of proof of the essential elements of obscenity, the requirement of proof of scienter, and all other protections required in judicial proceedings before publications ordinarily protected by the free speech and press provisions of the Constitution may be suppressed;

(d) 39 United States Code § 4006, on its face and as construed and applied, is vague, ambiguous and overbroad, lacks ascertainable standards, omits any requirement of scienter, vests unfettered discretion in an administrative agency to suppress speech and press, all resulting in the abridgment of the exercise of freedoms of speech and press and the deprivation of liberty and property without due process of law;

(e) 39 United States Code § 4006, on its face and as construed and applied, arbitrarily and capriciously

authorizes the Post Office Department to engage in invidious discrimination between constitutionally protected material and comparable material which the Post Office deems obscene for arbitrary and subjective reasons, all contrary to the due process and equal protection provisions of the Fifth Amendment to the United States Constitution;

(f) The magazines distributed by plaintiff are entitled to protection from all governmental infringement by the provisions of the First Amendment to the United States Constitution, that said magazines do not violate the provisions of 18 United States Code §§ 1461 and 1462, nor the provisions of any other federal statute.

3. To convene for the purpose of hearing and determining the application for a preliminary injunction of this cause, a statutory court of three judges, pursuant to the provisions of 28 United States Code § 2282, at least one of whom shall be a circuit judge, in accordance with the provisions of 28 United States Code § 2284.

4. The plaintiff be given all such other, further, and different relief as this Court may deem just.

/s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Plaintiff

VERIFICATION

STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES)

I am the Plaintiff in the above entitled action; I have read the foregoing COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF TO RESTRAIN THE DEFENDANTS FROM INTERFERING WITH PLAINTIFF'S MAIL PURSUANT TO 39 U.S.C. § 4006 and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I certify that the foregoing is true and correct.

/s/ Tony Rizzi
 TONY RIZZI

Subscribed and sworn to before me
 this 7th day of January, 1969

/s/ Aubrey I. Finn
 AUBREY I. FINN
 Notary Public in and for said
 County and State

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

[Filed Jan. 9, 1969]

* * *

Upon reading the verified complaint of plaintiff on file herein, and it appearing that defendants are withholding from plaintiff certain mail directed to the plaintiff related to alleged unlawful activity under 39 United States Code § 4006, and it further appearing that the aforesaid mail connected with the alleged unlawful activity will be returned to the senders, and it also appearing that plaintiff's business and goodwill will be greatly and irreparably damaged if he does not receive his mail, and it appearing that the magazines in question may be entitled to constitutional protection, and it appearing that the withholding and return of plaintiff's mail to the senders is causing and will, unless restrained by this Court, continue to cause plaintiff great and irreparable damage and injury, and it further appearing that plaintiff, by his complaint, has raised substantial questions as to the constitutionality of 39 United States Code § 4006 under the First, Fifth, Sixth and Seventh Amendments to the United States Constitution,

IT IS HEREBY ORDERED, JUDGED AND DECREED that defendants appear on the 20th day of January, 1969, at the hour of 10:00 A.M., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Manuel L. Real, United States District Judge, hearing room No. 14, United States Courthouse, 312 North Spring Street, Los Angeles, California, then and there to show cause, if any, why a preliminary injunction should not issue enjoining defendants and each of them and their agents, servants, employees and attorneys,

and all persons in active concert or participating with them,

(1) from any threatened proceedings, proceedings, acts, or other conduct enforcing the provisions of 39 United States Code § 4006 against plaintiff in relation to the books, magazines or advertisements distributed by plaintiff;

(2) from in any other manner, directly or indirectly, harassing or threatening plaintiff in the conduct of his business with respect to the sale or distribution of plaintiff's books, magazines and advertisements;

(3) directing the defendants to vacate the order of the Judicial Officer of the Post Office Department (No. 68-103) executed on December 31, 1968;

(4) to refrain from holding all mail directed to plaintiff related to the alleged unlawful activity and from returning said mail to the senders and to forward all mail to plaintiff without interference;

and further to show cause why the cause herein and plaintiff's motion for a preliminary injunction should not be heard before a three-judge District Court, pursuant to 18 United States Code §§ 2282 and 2284.

IT IS FURTHER ORDERED, JUDGED AND DECREED that pending hearing on the order to show cause, or until the court shall otherwise order, the defendants, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, are enjoined and restrained from returning any mail directed to the plaintiff and now being held by the Post Office Department as related allegedly to the unlawful activities of plaintiff under 39 United States Code § 4006.

IT IS FURTHER ORDERED that this order to show cause, the complaint, and points and authorities be served on the defendants on or before the 9th day of Jan., 1969.

/s/ [Illegible]

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

69-64-R

1/20/69

TONY RIZZI, ETC.

vs.

MARVIN WATSON, ETC., ET AL

DOCKET ENTRY

TRO contd in force and effect until 1/27/69 at
10AM and for fur hrg at that time. Applicn for
3 jddge ct not opposed. (R)

PRESENT:

HON. MANUEL L. REAL, Judge
ROBERT T. ERICKSEN
Deputy Clerk

LEE FEE
Court Reporter

Attorneys Present for Plaintiffs:
STANLEY FLEISHMAN for pltf.

Attorneys Present for Defendants:
LARRY DIER, Assistant U. S. Attorney

PROCEEDINGS:

HEARINGS OSC, fld 1/9/69, why preliminary in-
junction should not issue & for TRO.

Temporary Restraining Order continued in force and
effect until January 27, 1969 at 10AM for further hear-
ing at that time. Application for three judge court not
opposed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER RE: PRELIMINARY INJUNCTION

[Filed Jan. 29, 1969]

This cause came before the Honorable Manuel L. Real, United States District Judge, on January 27, 1969, on order to show cause re preliminary injunction, and, good cause appearing therefore,

IT IS HEREBY ORDERED:

1. That Plaintiff's application for the convening of a three-judge court, pursuant to the provisions of 28 U.S.C. 2282 and 2284, is hereby granted;

2. That until a judgment is entered in this action, defendants may not return and mark "Unlawful" any mail addressed to plaintiff, but instead may hold all mail sent to plaintiff for examination by plaintiff and such mail shall be delivered to plaintiff as is clearly not connected with the alleged unlawful activity which resulted in the Order by the Post Office Department of which plaintiff complains, i.e., any mail not relating to the magazines "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend".

DATED this 29th day of January, 1969.

/s/ Manuel L. Real
MANUEL L. REAL

United States District Judge

Approved as to Form:

WM. MATTHEW BYRNE, JR.,
United States Attorney

FREDERICK M. BROSI, JR.,
Assistant U. S. Attorney
Chief, Civil Division

/s/ Larry L. Dier
LARRY L. DIER
Asst. U. S. Attorney
Attorneys for Defendants, et al.
WINTON M. BLOUNT

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
 COUNTY OF)

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on January 27, 1969, I served the within ORDER RE: PRELIMINARY INJUNCTION on the Defendants by plaicng a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood addressed as follows:

WM. MATTHEW BYRNE, JR.

United States Attorney

FREDERICK M. BROSI0, JR.

Asst. U. S. Attorney

Chief, Civil Division

LARRY L. DIER

Asst. U. S. Attorney

United States Court House

312 North Spring Street

Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs
 YVONNE BURROUGHS

Subscribed and sworn to before
 me on January 27, 1969.

/s/ Evaleen Saquin

EVALEEN SAQUIN

Notary Public, Cal.

Com. Exp. June 18, 1971, Los Angeles Co.

1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ANSWER TO COMPLAINT

[Filed March 11, 1969]

For their answer to the plaintiff's complaint, the defendants admit, deny, and allege as follows:

I.

Admit the allegations contained in paragraphs IV, V, VI, and XII of plaintiff's complaint.

II.

Deny the allegations of paragraphs III, VII, VIII, IX and XI.

III.

Allege, as to paragraph X, the same admissions, denials, and allegations as in Count 1.

IV.

Allege that this is an unconsented suit against the sovereign and that the plaintiff fails to state a claim for relief against the defendants.

DATED: March 11, 1969.

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief of Civil Division

/s/ Larry L. Dier
LARRY L. DIER
Assistant U. S. Attorney
Attorneys for Defendants

CERTIFICATE OF SERVICE BY MAIL

I, Theresa L. Wilson, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on March 11, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ANSWER TO COMPLAINT addressed to:

Mr. Stanley Fleishman
Attorney at Law
Suite 700, Taft Building
1680 Vine Street
Hollywood, California 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on March 11, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Theresa L. Wilson
THERESA L. WILSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
Room 231, U. S. Courthouse
Los Angeles, California 90012

[Filed March 26, 1969]

Stanley Fleishman
Attorney-at-Law
Suite 700, Taft Bldg.
1680 Vine St.
Hollywood, Calif. 90028

Larry L. Dier,
Assistant U. S. Attorney
Room 1100
U. S. Courthouse
312 North Spring St.
Los Angeles, Calif.

Re: 69-64-R-Civil—Tony Rizzi, etc. vs
Marvin Watson, etc. et al

Gentlemen:

PLEASE TAKE NOTICE that the application for preliminary injunction in the above-entitled cause, has been set for hearing before the Honorable Shirley M. Hufstедler, U.S. Circuit Judge, 9th District; the Honorable Charles H. Carr, U.S. District Judge; and the Honorable Manuel L. Real, U. S. District Judge, to be called in Courtroom No. 14, in the U. S. Courthouse, 312 No.

Spring St., Los Angeles, Calif., at 10 AM on April 10th,
1969, pursuant to 28 USC 2284.

JOHN A. CHILDRESS
Clerk

By /s/ Josefina Dean
JOSEFINA DEAN
Deputy Clerk

Notice Mailed 3/26/69

Copies: Hon. Shirley M. Hufstedler
U.S. Circuit Judge, 9th District
1639 U.S. Courthouse
Los Angeles, Calif., 90012

Hon. Charles H. Carr
U.S. District Judge
Courtroom # 2 U. S. Courthouse
Los Angeles, Calif.
Mr. L. B. Figg, Clerk for Judge Carr

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 69-64-R

TONY RIZZI, doing business as THE MAIL BOX, PLAINTIFF
v.

WINTON M. BLOUNT, Postmaster General of the United
States of America; and EVERETT T. CARPENTER,
Postmaster of the City of Los Angeles, State of
California, DEFENDANTS

MEMORANDUM OPINION AND ORDER

[Filed June 10, 1969]

Before: HUFSTEDLER, Circuit Judge, and CARR and REAL,
District Judges

PER CURIAM:

Plaintiff brought this action for declaratory and injunctive relief against the Postmaster General of the United States and the Postmaster of the City of Los Angeles. Plaintiff alleges that 39 U.S.C. § 4006,¹ on its face, and as construed and applied to plaintiff, violates

¹ 39 U.S.C. § 4006 provides: "Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked 'unlawful'; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

rights guaranteed to the plaintiff by the First, Fifth, Sixth, and Seventh Amendments of the United States Constitution. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of the statute.

The statute authorizes the Postmaster General, after an administrative hearing, to decide whether mailed matter is obscene and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

The statute is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965) 380 U.S. 51. (Cf. *Lamont v. Postmaster General* (1965) 381 U.S. 301.) We have no occasion to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials claimed to be the subject of the administrative hearing.

Counsel for plaintiff is directed to prepare proposed findings of fact, conclusions of law, and judgment, pursuant to Local Rule 7 of this court and the Federal Rules of Civil Procedure.

/s/ Shirley M. Hufstедler
SHIRLEY M. HUFSTEDLER
United States Circuit Judge

/s/ Charles H. Carr
CHARLES H. CARR
United States District Judge

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Lodged June 23, 1969]

[Filed August 1, 1969]

THE ABOVE ENTITLED CAUSE came on regularly for hearing on plaintiff's motion for injunctive relief against the Postmaster General of the United States and the Postmaster of the City of North Hollywood, before the Honorable Shirley M. Hufstедler, Circuit Judge; and Honorables Charles H. Carr and Manuel L. Real, District Judges. Stanley Fleishman appeared for plaintiff, and Wm. Matthew Byrne, Jr., United States Attorney, by Larry Dier, Assistant United States Attorney, appeared for defendants.

The Court having heard oral argument, and having examined the file herein, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff Tony Rizzi, doing business as The Mail Box, is engaged in distributing by mail various publications.

II

Defendant Winton M. Blount is the Postmaster General of the United States of America, and defendant Everett T. Carpenter is the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the

receipt and distribution of materials sent through the United States mails for delivery in and from said City.

III.

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

IV

The said Order was made purportedly pursuant to 39 U.S.C. § 4006. Said Section authorizes the Postmaster General, after an administrative hearing, to decide whether mail matter is obscene, and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

V

39 U.S.C. § 4006 fails to meet the essential requirements necessary to restrain speech, set forth by the United States Supreme Court in *Freedman v. Maryland* (1965), 380 U.S. 51.

VI

It is not necessary to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials which were the subject of the administrative hearing.

CONCLUSIONS OF LAW

This is a proper case for the convening of a three-judge District Court in accordance with 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain

enforcement of 39 U.S.C. § 4006 on the ground that the said statute, on its face and as construed and applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth and Sixth Amendments to the United States Constitution.

II

Defendants have imposed a mail block against plaintiff's mail pursuant to 39 U.S.C. § 4006.

III

39 U.S.C. § 4006 is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965), 380 U.S. 51, wherein the United States Supreme Court imposed strict limitations on interference with freedoms of speech and press.

IV

Plaintiff is entitled to a judgment:

(a) directing the defendants to vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103), executed on or about December 31, 1968; and

(b) directing the defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference.

V

Plaintiff is entitled to a judgment restraining the defendants, and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from instituting against plaintiff any proceedings under 39 U.S.C. § 4006, and from enforcing or attempting to enforce the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

/s/ Shirley M. Hufstedler
SHIRLEY M. HUFSTEDLER
United States Circuit Judge

/s/ Charles H. Carr
CHARLES H. CARR
United States District Judge

/s/ Manual L. Real
MANUAL L. REAL
United States District Judge

APPROVED AS TO FORM:

/s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Plaintiff

WM. MATTHEW BYRNE, JR.,
United States Attorney

By /s/ Larry L. Dier
LARRY DIER
Assistant United States Attorney
Attorneys for Defendants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES)

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on June 19, 1969, I served the within FINDINGS OF FACT AND CONCLUSIONS OF LAW on the Defendants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles addressed as follows:

Wm. Matthew Byrne, Jr., U. S. Attorney
 Attention: Larry Dier, Asst. U. S. Attorney
 6th Floor, Federal Building
 Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs
 YVONNE BURROUGHS

Subscribed and sworn to before me on June 19, 1969.

/s/ Evaleen Saquin
 EVALEEN SAQUIN—Notary Public-Cal.
 Com. Exp. June 18, 1971—Los Angeles Co.
 1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

JUDGMENT

[Lodged June 23, 1969]

[Filed August 1, 1969]

THE COURT, having made its Findings of Fact and Conclusions of Law in the above entitled matter,

IT IS ORDERED, ADJUDGED AND DECREED, that defendants WINTON M. BLOUNT, Postmaster General of the United States of America; and EVERETT T. CARPENTER, Postmaster of the City of North Hollywood, State of California, and their agents, servants, employees and attorneys, and all persons in active concert or participating with them:

1. Vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103) executed on or about December 31, 1968; and

2. Deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference; and

3. Refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August 1969.

/s/ Shirley M. Hufstedler
SHIRLEY M. HUFSTEDLER
United States Circuit Judge

/s/ Charles H. Carr
CHARLES H. CARR
United States District Judge

/s/ Manuel L. Real
MANUEL L. REAL
United States District Judge

APPROVED AS TO FORM:

/s/ Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Plaintiff

WM. MATTHEW BYRNE, JR.,
United States Attorney

By /s/ Larry L. Dier
LARRY DIER
Assistant United States Attorney
Attorneys for Defendants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES)

YVONNE BURROUGHS, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 North Vine Street, Hollywood, California 90028; that on June 19, 1969, I served the within JUDGMENT on the Defendants by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles addressed as follows:

Wm. Matthew Byrne, Jr., U. S. Attorney
 Attention: Larry Dier, Asst. U. S. Attorney
 6th Floor, Federal Building
 Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Yvonne Burroughs
 YVONNE BURROUGHS

Subscribed and sworn to before me on June 19, 1969.

/s/ Evaleen Saquin
 EVALEEN SAQUIN—Notary Public-Cal.
 Com. Exp. June 18, 1971—Los Angeles Co.
 1680 North Vine St., Hollywood, Calif. 90028

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

MOTION FOR STAY OF JUDGMENT PENDING APPEAL;
AND AFFIDAVIT

[Filed August 13, 1969]

TO: HONORABLE SHIRLEY M. HUFSTEDLER,
UNITED STATES CIRCUIT JUDGE, UNITED
STATES COURT OF APPEALS, 9TH CIRCUIT;
HONORABLE CHARLES H. CARR AND MAN-
UEL L. REAL, UNITED STATES DISTRICT
JUDGES, CENTRAL DISTRICT OF CALIFOR-
NIA:

The defendants, by and through their attorneys, respectfully move this Court for a stay of the Judgment entered herein on August 1, 1969, pending appeal. This motion is being made pursuant to Rule 62 of the Federal Rules of Civil Procedure and is based upon the Affidavit of Assistant U. S. Attorney David H. Anderson attached hereto and incorporated herein by reference.

DATED: August 12, 1969.

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSILO, JR.
Assistant U. S. Attorney
Chief of Civil Division

/s/ David H. Anderson
DAVID H. ANDERSON
Assistant U. S. Attorney
Attorneys for Defendants

AFFIDAVIT OF ASSISTANT U. S. ATTORNEY DAVID H. ANDERSON

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

DAVID H. ANDERSON, being first duly sworn, deposes and says:

1. That he is an Assistant U. S. Attorney and has been assigned to this matter in the absence of Assistant U. S. Attorney Larry L. Dier (who is presently on vacation);

2. That on August 1, 1969 judgment was entered herein in favor of plaintiff and against defendants holding 39 U.S.C. § 4006 to be unconstitutional and ordering that defendants deliver to plaintiff all mail being held by defendants pursuant to said section;

3. That said judgment has been communicated to the Department of Justice in Washington, D. C., and the United States Solicitor General has been asked to decide whether an appeal should be taken from this adverse decision;

4. That pursuant to 28 U.S.C. § 2101(b) the defendants have 60 days within which to file a direct appeal to the United States Supreme Court;

5. That the undersigned has been advised by the U. S. Department of Justice that a decision on whether to appeal can be reached within 20 to 30 days from this date;

6. That on August 8, 1969, plaintiff's counsel sent a formal demand letter to the United States Attorney requesting that plaintiff's mail be delivered forthwith to plaintiff;

7. That important constitutional questions are involved herein which may have to be resolved by the United States Supreme Court;

8. That delivery of plaintiff's mail to plaintiff at this time would render moot the issues involved herein;

9. That all efforts possible are being expended to obtain a decision at the earliest time on whether or not

to appeal this judgment to the United States Supreme Court;

10. That a 30 day stay of judgment from this date would preserve the status quo and would not cause irreparable harm to the plaintiff herein;

11. That plaintiff's counsel has been advised by telephone of the filing of this motion and will be advised of the time and place of hearing on it, in accordance with Local Rule 3(j).

/s/ David H. Anderson
DAVID H. ANDERSON

Subscribed and sworn to before
me this 12th day of August, 1969.

/s/ Lois M. Parkinson
Notary Public in and for said
County and State
My Commission expires Nov. 9, 1970.

CERTIFICATE OF SERVICE BY MAIL

I, REBECCA R. JIMENEZ, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on August 12, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of EX PARTE MOTION FOR STAY OF JUDGMENT PENDING APPEAL; AND AFFIDAVIT addressed to

Stanley Fleishman, Esq., Atty. at Law
Suite 700 Taft Building
1680 Vine Street
Hollywood, California 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on August 12, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Rebecca R. Jimenez
REBECCA R. JIMENEZ

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

OPPOSITION TO EX PARTE MOTION FOR STAY OF JUDGMENT PENDING APPEAL AND MOTION TO REQUIRE DEFENDANTS TO DELIVER FORTHWITH TO PLAINTIFF ALL MAIL ADDRESSED TO PLAINTIFF BEING HELD BY DEFENDANTS & AFFIDAVIT

[Filed August 18, 1969]

TO: HONORABLE SHIRLEY M. HUFSTEDLER, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, HONORABLE CHARLES H. CARR and HONORABLE MANUEL L. REAL, United States District Judges, Central District of California:

Plaintiff, by and through his attorney, hereby opposes defendants' ex parte motion for stay of judgment pending appeal, and, in addition, hereby respectfully moves this Court for an order compelling defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in possession of defendants and to forward to plaintiff without interference all mail addressed to plaintiff.

This opposition and motion is based on the affidavit of Peter Marx, attached hereto and incorporated herein by reference, the judgment in the above-entitled cause, filed and entered on August 1, 1969, the findings of fact and conclusions of law in the above-entitled cause, filed August 1, 1969, the memorandum opinion and order in the above-entitled cause, filed June 10, 1969, and all the files, records and pleadings herein.

DATED: August 15, 1969.

STANLEY FLEISHMAN

By /s/ Peter Marx,
PETER MARX
Attorneys for Plaintiff

STATE OF CALIFORNIA)
)
) SS.
COUNTY OF LOS ANGELES)

1. I am an attorney admitted to the practice of law in the State of California, and the Central and Northern Districts of the United States District Court.

2. I am associated with the law offices of Stanley Fleishman, counsel for plaintiff in the case of *Tony Rizzi, etc. v. Blount, et al.*, Civil No. 69-64-R, United States District Court, Central District of California.

3. On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103, requiring that certain mail addressed to plaintiff being held by the Post Office be returned the senders thereof. Said order was issued pursuant to the provisions of 39 U.S.C. 4006.

4. On or about January 9, 1969, plaintiff filed this
aforementioned action, seeking, *inter alia*, injunctive re-
lief against the enforcement of the provisions of 39
U.S.C. 4006, and a declaration that said statute is un-
constitutional.

5. On or about January 29, 1969, the Honorable Manuel L. Real, United States District Judge, issued an order granting plaintiff's application for the convening of a three-judge court and further ordering that, pending judgment, defendants were not to return and mark "unlawful" any mail addressed to plaintiff, but instead to hold all such mail and deliver to plaintiff any mail clearly not connected with the alleged unlawful activity which resulted in the aforesaid order by the Post Office Department.

6. On or about June 10, 1969, the three-judge court which had been convened as aforesaid filed its Memorandum Opinion And Order in the above-noted cause, holding that 39 U.S.C. 4006 "... is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965) 380 U.S. 51 (Cf., *Lamont v. Postmaster General* (1965) 381 U.S. 301.)" Findings of fact and conclusions of law were filed August 1, 1969, and the judgment in the cause was filed and entered August 1, 1969. Pursuant to said judgment, the aforesaid order of the Judicial Officer of the Post Office Department was vacated, defendants were ordered to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward without interference all mail addressed to plaintiff and to refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. 4006 against plaintiff.

7. Plaintiff has accordingly made written demand upon defendants for the return of the aforesaid mail. Defendants are still holding said mail, and have moved for a stay of judgment pending appeal. They allege, *inter alia*, "that delivery of plaintiff's mail to plaintiff at this time would render moot the issues involved herein." See affidavit of David H. Anderson. Your affiant respectfully submits that such is not the case, since plaintiff, being in the mail order business, would have had standing to challenge the statute even if his mail had not actually been seized. Furthermore, in any event, as plaintiff continued to operate his mail order business, he may well be subjected to additional seizures should the decision be overturned on appeal. If the decision is affirmed, plaintiff will be able to continue operating his business without the restraints of the statute. In other words, regardless of the outcome on appeal, plaintiff will directly be affected thereby and in no sense can it be said that the issues involved herein would be rendered moot by return forthwith of mail to plaintiff presently held by defendants. In this regard, your affiant respectfully refers the court to *Ginsberg v. New York*, 390 U.S. 629, 633, 88 S.Ct. 1274, 1277, Fn. 2 (1968).

8. It is further alleged by defendants that a 30-day stay of judgment would preserve the status quo and would not cause irreparable harm to plaintiff. As to preserving the status quo, your affiant respectfully refers the Court to the above discussion regarding the issue of mootness, and respectfully submits that return of the mail would not effectually disturb the status quo. With respect to irreparable harm, initially it is to be noted that plaintiff's mail has now been held up for approximately eight months. Clearly, this amounts to an extensive prior restraint of First Amendment material. Furthermore, said prior restraint was effected pursuant to the provisions of a statute which this Court found to be unconstitutional on its face, in violation of the First Amendment, precisely because, under the terms of said statute, a prior restraint such as that involved herein could exist and continue to exist for an unlimited period of time, contrary to the very explicit requirements in this regard set forth by the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965). Your affiant thus submits that the continued existence of such a restraint constitutes per se irreparable harm, and, in view of the ruling of this Court, should not be allowed to continue further. Your affiant further states that irreparable harm exists not only by virtue of the limitation on plaintiff's First Amendment activities, but also by virtue of the fact that plaintiff is being deprived of considerable sums of money to which he is entitled, by virtue of the fact that defendants are holding plaintiff's mail. Additionally, the First Amendment rights (and money) of those people who wrote letters to plaintiff are also directly affected by the fact that their mail and money, addressed to plaintiff, is being held. *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965).

9. Accordingly, your affiant respectfully submits that there is and will continue to be considerable irreparable harm to plaintiff as a result of the fact that defendants are holding plaintiff's mail. Additionally, it is submitted that defendants have shown no countervailing reason which would require that the mail be held, particularly in view

of the substantial First Amendment rights which are being affected thereby. In view of the "preferred position" of the First Amendment, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943), your affiant thus respectfully submits that the motion for stay should be denied, and that plaintiff's motion for return of the mail should be granted.

/s/ Peter Marx
PETER MARX

Subscribed and sworn to before
me this 15th day of August, 1969.

/s/ Richard Lasalle
Notary Public in and for said
County and State.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

ANNELL MOORE, being first duly sworn, deposes and says:

That I am a citizen of the United States, and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; that my business address is Suite 700, 1680 No. Vine Street, Hollywood, California 90028; that on _____ 19____, I served the within Opposition to ex parte motion for stay of judgment pending appeal and motion to require defendants to deliver forthwith to plaintiff all mail addressed to plaintiff being held by defendants; and affidavit on the defendant by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood, California addressed as follows:

Larry Dier, Asst. U.S. Attorney
Federal Courthouse
312 North Spring Street
Los Angeles, California 90012

That there is delivery service by United States Mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ Annell Moore

Subscribed and sworn to before
me on August 15, 1969.

/s/ Richard Lasalle

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER

[Filed August 20, 1969]

GOOD CAUSE having been shown, it is hereby ordered, adjudged, and decreed that the Judgment entered herein on August 1, 1969 be and shall be stayed until September 10, 1969, pending appeal.

DATED: This 20th day of August, 1969.

United States District Judge

/s/ Charles H. Carr
United States District Judge

/s/ Shirley Hufstedler
Circuit Court Judge

Presented By:

/s/ David H. Anderson
DAVID H. ANDERSON
Assistant U. S. Attorney

JAC: To be filed without signature of Judge Real.

Judge Carr says that docket entry should show order signed by Judges Carr and Hufstedler but not signed by Judge Real as he is absent.

LBF

CERTIFICATE OF SERVICE BY MAIL

I, REBECCA R. JIMENEZ, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on August 12, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ORDER addressed to

Mr. Stanley Fleishman, Attorney at Law
Suite 700, Taft Building
1680 Vine Street
Hollywood, Calif. 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on August 12, 1968, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Rebecca R. Jimenez
REBECCA R. JIMENEZ

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

NOTICE OF APPEAL TO SUPREME COURT

[Filed Sept. 2, 1969]

NOTICE IS HEREBY GIVEN that Winton M. Blount, Postmaster General of the United States and Everett T. Carpenter, Postmaster of the City of Los Angeles, hereby appeal to the Supreme Court of the United States under 28 U.S.C. § 1252 and § 1253. This appeal is taken from the Judgment entered August 1, 1969, which, *inter alia*, enjoined the defendants from enforcing the provisions of 39 U.S.C. § 4006.

DATED: This 2nd day of September, 1969.

WM. MATTHEW BYRNE, JR.
United States Attorney

FREDERICK M. BROSIO, JR.
Asst. U.S. Attorney
Chief, Civil Division

/s/ Larry L. Dier
LARRY L. DIER
Asst. U.S. Attorney
Attorneys for Defendants

CERTIFICATE OF SERVICE BY MAIL

I, ALICE J. PARKA, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on September 2, 1969, I deposited in the United States mails in the United States Courthouse at 312 North Spring St., Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of NOTICE OF APPEAL TO SUPREME COURT addressed to

MR. STANLEY FLEISHMAN

Attorney at Law

Suite 700, Taft Building

1680 Vine Street

Hollywood, California, 90028

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on September 2, 1969, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Alice J. Parka
ALICE J. PARKA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

ORDER STAYING JUDGMENT

[Filed Sept. 26, 1969]

GOOD CAUSE having been shown, It is hereby
ORDERED, ADJUDGED, AND DECREED that the
Judgment entered herein on August 1, 1969, is stayed
until it becomes final after appeal.

DATED: This 26 day of September, 1969.

/s/ Shirley Hufstедler
United States Circuit Court
Judge

United States District Judge

/s/ Real
United States District Judge

Presented by:

/s/ Larry L. Dier
LARRY L. DIER
Asst. U.S. Attorney

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Caption Omitted]

EX PARTE MOTION FOR STAY OF JUDGMENT PENDING
APPEAL AND AFFIDAVIT OF LARRY L. DIER

[Filed Sept. 26, 1969]

The defendants, by and through their attorneys, respectfully move this Court for a stay of the Judgment entered herein on August 1, 1969, until it becomes final after appeal. This motion is being made pursuant to Rule 62 of the Federal Rules of Civil Procedure and is based upon the Affidavit of Assistant United States Attorney Larry L. Dier attached hereto.

DATED: This 26th day of September, 1969.

WM. MATTHEW BYRNE, JR.
United States Attorney
FREDERICK M. BROSIO, JR.
Asst. U.S. Attorney
Chief, Civil Division

/s/ Larry L. Dier
LARRY L. DIER
Asst. U.S. Attorney
Attorneys for Defendants,
Winton M. Blount, et al.

AFFIDAVIT OF LARRY L. DIER

STATE OF CALIFORNIA)
) ss.
 COUNTY OF LOS ANGELES)

LARRY L. DIER, being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney and is the attorney chiefly responsible for this litigation;

2. That on August 1, 1969, Judgment was entered herein in favor of plaintiff and against defendants holding 39 U.S.C. § 4006 to be unconstitutional and ordering that defendants deliver to plaintiff all mail being held by defendants pursuant to said section;

3. That said Judgment has been communicated to the Department of Justice in Washington, D.C., and the United States Solicitor General has been asked to decide whether an appeal should be taken from this adverse decision;

4. That on September 2, 1969, a Notice of Appeal was filed and on September 23, 1969, he was notified that the Solicitor General has authorized the appeal to proceed on its merits;

5. That on August 8, 1969, plaintiff's counsel sent a formal demand letter to the United States Attorney requesting that plaintiff's mail be delivered forthwith to plaintiff;

6. That important constitutional questions are involved herein which will be resolved by the United States Supreme Court;

7. That delivery of plaintiff's mail to plaintiff at this time may render moot the issues involved herein;

8. That plaintiff's counsel was advised by telephone of the filing of this motion by telephone at about 10:30 a.m., September 26, 1969, in accordance with Local Rule 3(j). Plaintiff's counsel requested him to advise the Court that he feels any stay ought to only allow defendants to hold any mail already detained but not allow

defendants to detain mail henceforth directed to plaintiffs.

/s/ Larry L. Dier
LARRY L. DIER

Subscribed and sworn to before me
this 26th day of September, 1969.

/s/ Lois M. Parkinson
LOIS M. PARKINSON
Notary Public in and for said
County and State
My Commission Expires Nov. 9, 1970.

SUPREME COURT OF THE UNITED STATES

No. 788, October Term, 1969

WINTON M. BLOUNT, Postmaster General of the
United States, ET AL., APPELLANTS

v.

TONY RIZZI DBA THE MAIL BOX

APPEAL from the United States District Court for
the Central District of California.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary
calendar.

March 2, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 12812

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1969	
June 12	<p>Complaint for temporary restraining order & Preliminary injunction, with Exh. A, filed.</p> <p>Letter dated 6/12/69 from U. S. Att'y to deft. advising that proposed temporary restraining order for Judge Edenfield's consideration will be presented to him on Monday, June 16, 1969, at 4:30 p.m. attached to complaint.</p> <p>Summons issued & delivered to U.S. Marshal.</p>
June 17	<p>Marshal's return on service executed 6-13-69, filed.</p>
June 17	<p>Deft's motion to dismiss complaint for temporary restraining order & preliminary injunction, filed.</p> <p>Recitation of points & authorities in support of deft's motion to dismiss, with attachments, filed.</p> <p>Motion for interlocutory injunction, filed. Counterclaimant's petition for interlocutory & permanent injunction & application for 3-Judge court, filed.</p> <p>To NE by counsel. Came on for hearing on petition for temporary restraining order—case reset for Monday, June 23, 1969 at 3:00 p.m.</p>
June 23	<p>Hearing had on pet. for temporary restraining order. The following were filed: (1) Pltfa.' Memorandum in support of application for preliminary injunction; (2) Motion by U. S. to dismiss deft's. "Motion for interlocutory injunction" and deft's. "Petition for interlocutory and permanent injunction and application for three-judge court.</p> <p>Deft's. supplemental recitation of points and authorities in support of motion to dismiss complaint for temporary restraining order and preliminary injunction—filed.</p>

DATE

PROCEEDINGS

1969

- June 23 Order of Chief Judge John R. Brown, U.S. C.A., designating Circuit Judge Lewis R. Morgan and District Judges Frank A. Hooper and Newell Edenfield to constitute a 3-Judge Court—filed. (Counsel advised)
- Set for hearing before 3-Judge Court on Tuesday, 7-1-69, at 9:30 A.M. Counsel advised.
- June 25 Copy of pleadings to date to 3 Judges.
- June 30 Pltfs' reply brief, filed. Copy to each judge. Transcript of proceedings of 6-23-69, filed. To FAH.
- July 1 Hearing had before 3-Judge Panel, on counterclaim attacking Constitutionality of Govt's. petition. Court allowed parties to 7-15-69 to file briefs, then to be submitted.
- July 15 Pltf's. supplemental brief, filed. Copy to each judge.
- July 16 SUBMITTED PURSUANT TO DOCKET ENTRY OF 7/1/69.
- Aug. 25 Steno-type notes, filed.
- Sept. 9 ORDER filed that findings of obscenity under the statutory scheme here is either too little (§ 4007) or too late (§ 4006), and is unconstitutional & the court GRANTS DEFT'S Motion to Dismiss and its counterclaim. Copies to counsel.
- Sept. 24 NOTICE OF APPEAL TO THE SUPREME COURT filed by pltfs. (Copy to opposing counsel & Clerk Supreme Court)
- Oct. 16 JUDGMENT filed and entered by Clerk, for deft., THE BOOK BIN, and against pltfs., U. S. & The Postmaster General, and for costs. (Copy to counsel)
- Oct. 16 Pltfs' notice of appeal to the Sup. Ct. from the final judgment entered Oct. 16, 1969, filed. Certified copy to Sup. Ct.; copy to opposing counsel.

1970—In the United States Supreme Court

- March 2 Order of the Supreme Court noting probable jurisdiction and placing case on summary calendar.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Civil No. 12812

UNITED STATES OF AMERICA and the
POSTMASTER GENERAL, PLAINTIFFS

v.

THE BOOK BIN at 123 Simpson Street, N. W.,
Atlanta, Georgia, DEFENDANT

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

[Filed June 12, 1969]

For their claims against the defendant, the plaintiffs allege as follows:

1. That this Court has jurisdiction under 28 U.S.C. 1345 and 39 U.S.C. 4007.

2. That the attached Affidavit, marked as Exhibit "A", is incorporated herein by reference and shows that a Complaint has been filed under 39 U.S.C. 4006 against the defendant to determine the obscenity of materials being mailed by the defendant.

3. That pursuant to 39 U.S.C. 4007, the plaintiffs are entitled to a Temporary Restraining Order and Preliminary Injunction directing the detention of the defendant's incoming mail during the pendency of the administrative hearing before the Post Office.

4. That, as more fully appears in Exhibit "A", this Temporary Restraining Order and Preliminary Injunction are needed to preserve the status quo and, in the event the material being mailed by The Book Bin is found obscene, to allow for the effective enforcement of the statutes against mailing obscene matters which Congress clearly intended in the enactment of 39 U.S.C. 4006 and 4007.

5. That, as provided by 39 U.S.C. 4007, the plaintiffs are willing for the Temporary Restraining Order and

Preliminary Injunction to provide that the detained mail may be opened to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity.

WHEREFORE, plaintiffs pray that a Temporary Restraining Order issue forthwith directing the detention by the Post Office Department of all of the defendant's incoming mail; that a time be set for a hearing on the plaintiffs' request for a Preliminary Injunction detaining such mail during the pendency of the statutory proceeding or appeal therefrom.

/s/ John W. Stokes, Jr.
JOHN W. STOKES, JR.
United States Attorney

/s/ Charles B. Lewis, Jr.
CHARLES B. LEWIS, JR.
Assistant United States Attorney
Attorneys for plaintiffs,
United States of America and
The Postmaster General

VERIFICATION

STATE OF GEORGIA)
) ss.
 COUNTY OF FULTON)

Charles B. Lewis, Jr., being first duly sworn, deposes and says: That he is an Assistant United States Attorney and is the attorney chiefly responsible for this litigation; that he has read the above Complaint and knows the contents of it; that the information contained in the Complaint has been furnished by official government sources; and, based on information and belief, the allegations contained in the Complaint are true.

/s/ Charles B. Lewis, Jr.
 CHARLES B. LEWIS, JR.,
 Affiant

Subscribed and Sworn to before me this 12th day of June, 1969.

/s/ Theodore E. Smith
 Notary Public in and for said County and State.
 My Commission Expires:

EXHIBIT "A"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

AFFIDAVIT OF WILLIAM F. LAWRENCE IN SUPPORT OF
COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

I, William F. Lawrence, having been duly sworn, depose and say:

1. The Affiant is Complainant in the administrative proceeding instituted in the Post Office Department, POD Docket 3/23 and in support of this application for a temporary restraining order and preliminary injunction pursuant to Title 39, U. S. Code § 4007, states:

2. That the Complaint against The Book Bin, copy whereof is attached hereto, sets forth a good and sufficient cause of action under the provisions of Title 39, U. S. Code § 4006.

3. That the evidence to be presented at the administrative hearing on the Complaint will include a magazine, and advertising material, for which, and by which, remittances of money are solicited by The Book Bin, and which are described in certain advertisements and magazines, true copies of which are attached hereto, which said concern deposits or causes to be deposited in the mails.

4. That Affiant has received certain of the matter deposited in the mails by The Book Bin, responsive to its advertising matter, and is convinced that it is obscene, lewd, lascivious, indecent, filthy and vile within the meaning and definition of such terms in 39 U. S. C. § 4006.

5. That, upon information and belief, The Book Bin is not a publisher or distributor having second-class mail entry, and thus does not come within the exception contained in 39 U. S. C. § 4007.

6. Affiant avers that The Book Bin is receiving substantial revenues of mail daily containing remittances of

money pursuant to the unlawful enterprise hereinbefore and in the Complaint in POD Docket No. 3/23 more fully described, and will continue to receive such mail and remittances during the pendency of the administrative proceeding, and, therefore, Affiant respectfully submits that it is necessary to its effective enforcement of Title 39, U. S. Code, § 4006, that an order be issued directing that mail addressed to The Book Bin be held and detained by the appropriate delivery postmaster pending the conclusion of all administrative proceedings against said mailer pursuant to 39 U. S. C. § 4007, or for such other relief as the Court may deem appropriate in the premises.

The Affiant will not object to a provision in the order that detained mail may be opened to examination by the Defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity.

/s/ William F. Lawrence
WILLIAM F. LAWRENCE
Assistant General Counsel
Mailability Division

Subscribed and sworn to before me this 6th day of June, 1969.

/s/ Lawrence B. Gowen
Notary Public

My commission expires May 14, 1971

POST OFFICE DEPARTMENT
WASHINGTON, DC 20206

P.O.D. Docket 3/23

In the Matter of the Complaint Against
THE BOOK BIN at 123 Simpson Street, N. W.
Atlanta, Georgia 30313

COMPLAINT

The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges that, under the name set forth in the caption hereof (hereinafter called the Respondent), there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U. S. Code, and in support of that belief alleges as follows:

(1) That the Respondent is now, and for some time heretofore, has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles, namely a certain magazine;

(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

(3) That attached hereto as Exhibit "A" is a true copy of the said circular matter mentioned in the item next above;

(4) That to persons remitting to Respondent the sums of money stated in the aforesaid advertisement and solicitation, the Respondent sends articles, among them the following magazine which is of an obscene, lewd, lascivious, indecent, filthy or vile nature:

"MODELS DE FRANCE"

(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy or vile articles to all those who make appropriate remittances of money therefor.

WHEREFORE, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE BOOK BIN, or agents or representatives of such, in accordance with the provisions of said Title 39, U. S. Code, Section 4006.

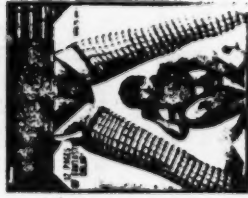
/s/ W. F. Lawrence
WILLIAM F. LAWRENCE
Assistant General Counsel
Mailability Division
COMPLAINANT

FINE PENDULUM MAGAZINES FOR THE CONNOISSEUR

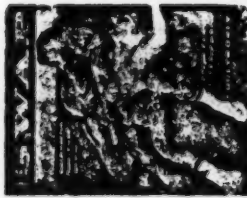
The Book Bin is proud to bring you, for the FIRST TIME, an excellent selection of newly-published magazines never before offered by mail. Many are published by Pendulum - and have the same high quality you have come to expect in Pendulum paperbacks. Supplies are limited of these fast-moving titles, so order now!



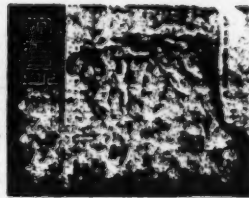
M-1 Roulette
Vol. 2, #4 \$3.00



M-6 Lezo
Vol. 2, #5 \$3.00



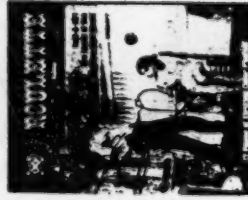
M-11 Swap
Vol. 2, #4 \$3.00



M-16 Carter Girls
Vol. 2, #3 \$2.50



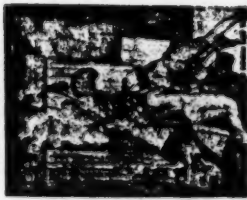
M-21 Blazing Films
Vol. 2, #4 \$2.00



M-2 Roulette
Vol. 2, #5 \$3.00



M-7 Lezo
Vol. 2, #3 \$3.00



M-12 Swap
Vol. 2, #5 \$3.00



M-17 Carter Girls
Vol. 2, #4 \$2.50



M-22 Blazing Films
Vol. 2, #5 \$2.00



M-3 Body & Soul
Vol. 1, #1 \$2.50



M-8 The Wild Cats
Vol. 2, #4 \$3.00



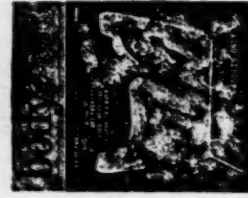
M-13 Dynamic Films
Vol. 2, #5 \$2.00



M-18 Carter Girls
Vol. 2, #5 \$2.50



M-23 Foxy Lady
Number 1, \$5.00



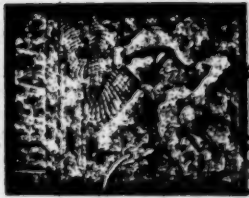
M-4 Body & Soul
Vol. 1, #2 \$2.50



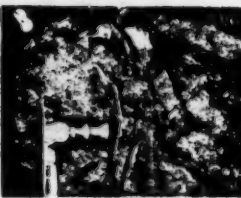
M-9 The Wild Cats
Vol. 2, #5 \$3.00



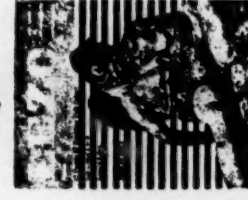
M-14 Dynamic Films
Vol. 2, #3 \$2.00



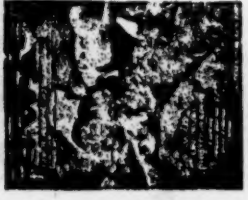
M-19 Young Beavers
Vol. 2, #4 \$2.50



M-24 Cherry
\$5.00



M-5 Lezo
Vol. 2, #4 \$3.00



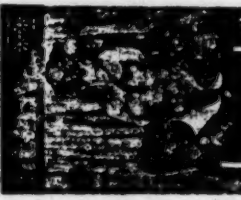
M-10 Swap
Vol. 2, #3 \$3.00



M-15 Dynamic Films
Vol. 2, #4 \$2.00



M-20 Young Beavers
Vol. 2, #5 \$2.50



M-25 Helena
\$5.00

EXHIBIT A

58a



M-26 Model Parade
Number 1, \$5.00



M-31 Model Parade
Only \$2.50



M-27 Fabulous
Only \$5.00



M-32 Miss Lesbo
Number 1, \$5.00



M-28 Models de France
Only \$3.50



M-33 Living Dolls
Vol. 1, \$5.00



M-29 Models d'Italia
Only \$3.50



M-34 Modern Women
Vol. 1, \$5.00



M-30 Figure View
Only \$2.50



M-35 Fantastic
Only \$5.00

ILLUSTRATED PENDULUM PICTORIAL PAPERBACKS

Each volume contains 80 actual photographs of young and attractive men and women in thrill-packed action!



Bye Bye Broadie
PP001 \$1.75



Raped in the Grass
PP002 \$1.75



The Erotic Spy
PP003 \$1.75



Prison Passion
PP004 \$1.75



Nazi Field Whores
PP005 \$1.75



Svengali of Sex
PP006 \$1.75

Please order by catalogue number

THE BOOK BIN

123 SIMPSON STREET, N.W.

ATLANTA, GEORGIA 30313

no C.O.D.'s, no stamps

Please send me the following books: (Please use catalogue numbers)

_____	Magazines @ \$2.00 = \$ _____
_____	Magazines @ \$2.50 = \$ _____
_____	Magazines @ \$3.00 = \$ _____
_____	Magazines @ \$3.50 = \$ _____
_____	Magazines @ \$5.00 = \$ _____
_____	Books @ \$1.75 = \$ _____
_____	TOTAL \$ _____

Name _____

Address _____

City _____

State _____

Zip _____

NOTE: Orders containing cash or money orders are shipped immediately.

We hold check orders until check has cleared.

POST OFFICE DEPARTMENT
WASHINGTON, DC 20206

P.O.D. Docket 3/23

In the Matter of the Complaint Against
THE BOOK BIN at 123 Simpson Street, N. W.
Atlanta, Georgia 30313

MOTION FOR EXPEDITED PROCEEDING

In a complaint concurrently filed herewith, The Book Bin (Respondent) is charged with violation of 39 U. S. Code 4006. Complainant files this motion pursuant to Section 952.17(a) of the Rules of Practice for an expedited hearing to be presided over by the Judicial Officer for the following reasons:

1. Elimination of intermediate procedural steps will be of advantage to both parties and better serve the interests of the public. If, as the Complainant has probable cause to believe, the Respondent has been, and is, engaging in the activities which formed the basis for the Complaint and has been receiving remittances therefor, it is imperative in the public interest that such activities be curbed as quickly as possible. If the Respondent's activities do not form the basis for appropriate order directed against such activities, then it should be in the interest of the Respondent to proceed expeditiously.
2. Based on information and belief, the Respondent continues to engage in the activities complained against and continues to seek and obtain remittances in the mail.
3. Complaints continue to be received concerning the activities of the Respondent which form the basis of the Complaint.
4. Because of the seriousness of the issues and related matters, it is believed that, ultimately, the Judicial Officer will be called upon to review the record and perhaps be required to review and act on other procedural matters which, under the expedited procedure requested herein, could be disposed of during the hearing and immediately processed without further appeal.

WHEREFORE, it is requested that on the basis of the foregoing, and for good cause shown, the Judicial Officer preside at the Hearing of the captioned proceeding and that said Hearing be scheduled for an early date agreeable to all parties concerned herein.

DAVID A. NELSON
General Counsel

/s/ W. F. Lawrence
By: WILLIAM F. LAWRENCE
Assistant General Counsel
Mailability Division

/s/ Jerry P. McKinnon
JERRY P. MCKINNON
Trial Attorney

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Northern District of Georgia
402 Old Post Office Bldg.
P. O. Box 912
Atlanta, Georgia 30301

June 12, 1969

The Book Bin
123 Simpson Street, N.W.
Atlanta, Georgia 30313

12812

Gentlemen:

Enclosed is a Complaint for Temporary Restraining Order and Preliminary Injunction which we have filed with the Clerk of the United States District Court for the Northern District of Georgia.

Please be advised that we will present to Judge Newell Edenfield a proposed Temporary Restraining Order for his consideration on Monday, June 16, 1969, at 4:30 P.M. in his chambers, Third Floor, Old Post Office Building, Atlanta, Georgia. We will also ask Judge Edenfield to set a date for a hearing on our motion for a preliminary injunction.

Yours very truly,

JOHN W. STOKES, JR.
United States Attorney

/s/ Charles B. Lewis, Jr.
By: CHARLES B. LEWIS, JR.
Assistant U. S. Attorney

Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

DEFENDANT'S MOTION TO DISMISS COMPLAINTS FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGE OF SAID
COURT:

The Book Bin, Inc., a body corporate of the State of Georgia, by and through its attorneys, High Gibert, Esquire and Robert Eugene Smith, Esquire, of Counsel moves to dismiss the Complaint for Temporary Restraining Order and Preliminary Injunction filed by the United States Attorney for the Northern District of Georgia, on behalf of the United States of America and the Postmaster General as Plaintiffs, for any one or all of the following reasons:

1. "MODEL DE FRANCE", the magazine publication sought to be suppressed via the Post Office Department's proceedings, is not obscene as a matter of law in the constitutional sense, nor is there any "probable cause" to believe that the said magazine is obscene under Federal Constitutional standards.

2. Plaintiff's Complaint praying a temporary restraining order fails to establish by the recitation of specific facts, shown by affidavit or verified Complaint, that immediate and irreparable injury, loss or damage will result to Plaintiff's or any substantial subordinating interest represented by Plaintiffs, and Defendant affirmatively avers that no immediate and irreparable injury, loss or damage will result to Plaintiffs by denial of the Temporary Restraining Order.

3. That any Temporary Restraining Order or Preliminary Injunction as prayed for by Plaintiffs will operate as a constitutionally prohibited "prior restraint" on

the exercise of Defendant's *First Amendment* rights to distribute printed matter, and will have a substantial "chilling effect" on Defendant's right to sell and distribute presumptively protected printed matter, and

4. That the Act of Congress under which Plaintiffs are proceeding to obtain an interim impounding order from this Court, codified at *Title 39, U.S.C.A., Section 4007*, is unconstitutional as written and/or as applied, or in its threatened application by the Postmaster General of the United States, his agents, servants, employees and attorneys and others under his direction and control, and is repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* on each and any one of the following basis:

A) The said statutory provisions permit an *ex parte* temporary restraining order to be entered by the United States District Court on application by the Postmaster General requiring only "probable cause" before suppression of presumptively protected *First Amendment* materials, and

B) The exception created under Subsection (B) of said statutory provision relative to exempting publishers of publications which have entry as Second Class Matter or agents of any such publishers is without foundation and deprivation of Counterclaimant's constitutionally mandated right to equality under the law.

C) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of federal constitutional rights of the citizens of the United States who desire to purchase and receive such publications, as well as of Counterclaimant to distribute, circulate and/or sell said publications; and further,

D) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth*

Amendment to the United States Constitution because they permit deprivation of liberty and/or property interest for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means on the part of the Postmaster General, his agents, servants, and employees, without a showing of a real and substantial relationship to any subordinating interest which is compelling to justify federal action limiting *First Amendment* freedoms; and further,

E) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth Amendment to the Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

F) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, and Fifth Amendments to the Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and other under his direction and control; and further,

G) Said statutory provisions are repugnant to the *First and Fifth Amendments to the Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

5. That the Act of Congress on which Plaintiffs beased their *Complaint for Temporary Restraining Order and Preliminary Injunction*, codified under Title 39, U.S.C.A., Section 4006, entitled "‘Unlawful’ Matter", is unconstitutional as written and repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* for each and any one of the following basis.

A) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth Amendment* to the *Constitution of the United States*; and further,

B) Said statutory provisions are void by overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment*; and further,

C) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth and Fifth Amendments to the Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and others under his direction and control; and further,

D) Said statutory provisions are repugnant to the *First and Fifth Amendments to the Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

6. That the Act of Congress under which Plaintiffs are proceeding to obtain an interim impounding order from this Court, codified at *Title 39, U.S.C.A. Section 4006*, entitled, " 'Unlawful' Matter" is unconstitutional as applied and in its threatened application by the Postmaster General of the United States of America, his agents, servants, employees, attorneys, and others under his direction and control, and repugnant to the *First*,

Fourth and Fifth Amendment to the Constitution of the United States of America, for each and any one of the following basis;

A) The procedures as applied in the context of the protections for free speech and press secured under the *First Amendment* by the Postmaster General, his agents, servants, employees and attorneys, permit a suppression of presumptively protected printed matter without a prior judicially superintended adversary hearing for the purpose of determining whether said presumptively protected printed matter is obscene as a matter of law in the constitutional sense; thus depriving said Counter-claimant of rights under the *First and Fifth Amendments* to the *Constitution of the United States*; and said procedures as applied and as threatened to be applied *in futuro* under color of enforcement of said statutory provisions against Counterclaimant, fail to insure against the curtailment of constitutionally protected expression, and as such are void for impermissible overbreadth, and

B) The procedures as applied herein in the context of the constitutional protections afforded for free speech and press, by the Postmaster General, his agents, servants and employees under the referenced statutory provisions, have the effect and threaten to have the effect of inhibiting the protected expression and abridging the right of the public to unrestricted circulation of presumptively protected non-obscene publications, as well as the right of Counterclaimant to circulate and distribute such said publications on which there has been no final judicial determination of obscenity before suppression, and as such the statute as applied is void for impermissible overbreadth by means which sweep unnecessarily broadly and stifle fundamental rights and liberties afforded Counterclaimant and interested citizens of the United States, when the end can be more narrowly achieved under less drastic provisions to serve a constitutionally proper federal governmental interest, and

C) The procedures as applied under the referenced statutory provisions by the Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, involve the use of terminology and standards by them under color of enforcement of the said statutory provisions which forbid or attempt to forbid Counterclaimant from the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and hence said provisions are constitutionally deficient and void for vagueness, and

D) The application of the referenced statute by the Postmaster General of the United States involves the use by him, his agents, servants, employees and attorneys and others under his direction and control of a statute which contains no element of "scienter" and unconstitutionally deprives Counterclaimant from the exercise of its *First Amendment* rights, without the constitutionally mandated requirement that Counterclaimant have the requisite "guilty knowledge", and

E) The Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, in the application of said statute have acted in an arbitrary, capricious and unreasonable manner in attempting to enforce said statutory provisions and said arbitrary, capricious and unreasonable actions are and were repugnant to the Counterclaimant's constitutional rights under the *First and Fifth Amendments* to the *Constitution of the United States*.

7. That notwithstanding the patent unconstitutionality of *Title 39, U.S.C.A., Section 4006*, and the application of *Title 39, U.S.C.A. Section 4007*, in the context of the constitutional protections afforded free speech and press, there is further patent unconstitutionality in that after the full and complete hearing being requested by the Office of the General Counsel for the Post Office Department and final decision rendered by the judicial hearing

officer, the burden of going forward in instituting appellate judicial review falls on the person who seeks to exercise his *First Amendment* rights and this burden is repugnant to the *First and Fifth Amendments* to the *Constitution of the United States* and contrary to the teachings of *Freedman vs. Maryland*, 380 U.S. 51 at Page 60; further,

The statue and the rules and regulations implemented thereunder, do not provide by its terms, any assurance as to the time period within the administrative hearing must be held after issue is joined or a specified brief time period within which the Post Office Department Judicial Hearing Officer must rendered his decision; nor is there any statutory provision or departmental rule or regulation specifying the time within which the Exceptions to Initial Decision or Tentative Decision that may be taken must be considered and resolved. Further, there is no statutory assurance or rule or regulation that specifies the time within which the Final Post Office Department Decision must be rendered or a Motion for Reconsideration resolved. The failure of the Statute and/or rules and regulations implemented thereunder is contrary to the teaching of *Freedman vs. Maryland* 380 U.S. 51 and *Teitel Film Corp. vs. Cusack* 19 L ed 2d 966 at 969. and accordingly the said statute is further repugnant to the *First, Fourth and Fifth Amendments* to the Constitution of the United States and operates as a constitutionally prohibited "prior restraint".

8. That Plaintiffs knew, or should have known that on June 12, 1969, the date of the filing of the Complaint for Temporary Restraining Order or shortly thereafter, that the Act of Congress, codified at *Title 39, U.S.C.A., Section 4006*, was declared to be unconstitutional as written, in the United States District Court for the Central District of California, by a Three Judge tribunal, in a case styled:

Tony Rizzi, t/a The Mail Box

VS

Winton M. Blount, as Postmaster General
of the United States, et al.

Civil Action No. 69-64R

Said Act of Congress, declared by the said United States District Court Three Judge panel to be repugnant to the Constitution of the United States, is the very same statute and employing the same procedures, that Plaintiffs seek to invoke in their present *Complaint for Temporary Restraining Order and Preliminary Injunction*, in the case at bar.

A copy of the decision of the United States District Court for the Central District of California will be furnished this Court upon their receipt and attached hereto as *Defendant's Exhibit A*, in support of it's Motion to Dismiss and the contents thereof is incorporated herein by reference.

Wherefore, Defendant prays that the relief prayed in the Complaint for Temporary Restraining Order and Preliminary Injunction filed in this Court by the United States Attorney for the Northern District of Georgia, on behalf of the United States of America and the Postmaster General be denied and the Complaint itself be dismissed.

Respectfully submitted:

/s/ Hugh Gibert
 HUGH W. GIBERT
 Suite 2709, First National
 Bank Bld.
 Atlanta, Georgia, 30303
 Attorney for Counterclaimant

/s/ Robert Eugene Smith
 ROBERT EUGENE SMITH
 Suite 507, The Alex Brown & Sons Bldg.
 102 West Pennsylvania Avenue,
 Towson, Maryland, 21204
 Area Code (301) 821-6868
 Of Counsel for Counterclaimant

CERTIFICATE OF SERVICE**COUNTY OF FULTON:****STATE OF GEORGIA:**

A copy of Counterclaimant's Motion to Dismiss Complaint for Temporary Restraining Order and Preliminary Injunction, has been personally served this 17th day of June, A.D. 1969, by the undersigned, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorney's for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr., Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith
ROBERT EUGENE SMITH
Of counsel to
The Book Bin, Inc.
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned, a Notary Public in and for the County and State Aforesaid, This 17th Day of June A.D., 1969.

/s/ Alice J. Saxe
Notary Public,
Georgia, State at Large
My Commission Expires
April 27, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Docket # 12812

THE UNITED STATES OF AMERICA
and THE POSTMASTER GENERAL

vs

THE BOOK BIN, INC., DEFENDANT

THE BOOK BIN, INC., COUNTERCLAIMANT

vs

THE HONORABLE WINTON M. BLOUNT, Postmaster General of the United States of America and THE UNITED STATES OF AMERICA, DEFENDANTS

I. MOTION FOR INTERLOCUTORY INJUNCTION

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGES OF SAID
COURT:

The Book Bin, Inc., counterclaimant, by and through it's attorneys, Hugh Gibert, Esquire and Robert Eugene Smith, Esquire, of counsel, moves the Court under the provisions of *Rule 65* of the *Federal Rules of Civil Procedure* for a *Interlocutory Injunction*, restraining and enjoining, the Postmaster General, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concert with them, from continuing the following unconstitutional and unlawful acts, to wit:

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A. Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First Amendment* materials, pending final hearing and de-

termination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and;

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department in the case styled:

"In the Matter of the Complaint Against:

THE BOOK BIN"

carried as P.O.D. Docket 3/23, now scheduled for expedited hearing at the request of the Assistant General Counsel, Mailability Division, before Peter R. Rosenblatt, Post Office Department Judicial Officer, on July 8, 1969, at 10:00 A.M.; pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment.

II. Unless the Postmaster General of the United States, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concert with them are so enjoined and restrained, immediate and irreparable harm will result to Counterclaimant by the deprivation and threatened deprivation of the exercise of said Counterclaimant's rights secured to it by the *First, Fourth and Fifth Amendments to the Constitution of the United States* as more particularly described in the *Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court* and exhibits attached and filed therewith.

Further, the danger of irreparable harm is all the more patent because of the grossly unconstitutional standards and procedures employed under the Acts of Congress codified at *Title 39, U.S.C.A., Sections 4006 and 4007*. The actions of the Postmaster General, his agents, servants, employees, attorneys, and others acting under his direction and control and each of them, and persons in active concert with them, have and threaten to have a "chilling effect" on the exercise of Counterclaimant's

First Amendment rights as well as on the exercise of the *First Amendment* Rights of other similarly situate.

The factual allegations of the Counterclaimant's *Petition for Interlocutory Permanent Injunction and Application for Three-Judge Court*, considered together with the publication, "Models de France", which is not obscene as a matter of law in the constitutional sense, make it patently clear that the Postmaster General, his agents, servants, employees and attorneys are enforcing and attempting to enforce the Acts of Congress, codified as *Title 39, U.S.C.A., Sections 4006 and 4007*, the constitutionality of which are more than merely suspect, in a patently unconstitutional manner and by the exercise of arbitrary, capricious and virtually unbridled discretion, all to the immediate and irreparable harm of the Counterclaimant.

Respectfully submitted:

/s/ Hugh Gibert
HUGH W. GIBERT
Suite 2709, First National
Bank Building
Atlanta, Georgia, 30303
Attorney for Counterclaimant
The Book Bin, Inc.

By: /s/ R. D. Underhill
R. D. UNDERHILL
Vice President
Counterclaimant

/s/ Robert Eugene Smith
ROBERT EUGENE SMITH
Suite 507
The Alex. Brown & Sons Bldg.
102 West Pennsylvania Avenue,
Towson, Maryland 21204
Area Code (301) 821-6868
Of Counsel for Counterclaimant

CERTIFICATE OF SERVICE

COUNTY OF FULTON:

STATE OF GEORGIA:

A copy of Counterclaimant's Motion for Interlocutory Injunction, has been personally served this 17th day of June, A.D. 1969, by the undersigned, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorneys for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr. Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith
ROBERT EUGENE SMITH
Of counsel to
The Book Bin, Inc.
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned, a Notary Public in and for the County and State Aforesaid, This 17th Day of June A.D., 1969.

/s/ Alice J. Saxe
Notary Public,
Georgia, State at Large
My Commission Expires
April 27, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

COUNTERCLAIMANT'S PETITION FOR INTERLOCUTORY AND
PERMANENT INJUNCTION AND APPLICATION FOR
THREE-JUDGE COURT

[Filed June 17, 1969]

TO THE HONORABLE, THE JUDGES OF
SAID COURT:

The Book Bin, Inc., a body corporate of the State of
Georgia, as Counterclaimant by and through its attor-
neys, Hugh Gibert, Esquire and Robert Eugene Smith,
Esquire, of counsel, by their counterclaim for cause of
action represent to the Court as follows:

Jurisdiction

I. Jurisdiction whereby Counterclaimant
1. This is a civil action and permanent injunction issue
prays an interlocutory and permanent injunction issue
to restrain the enforcement of Title 39, U.S.C.A. Sections
4006 and 4007 because the same are unconstitutional as
written, and/or in the alternative, to restrain the en-
forcement of Title 39, U.S.C.A., Sections 4006 and 4007
because said statutes are unconstitutional as applied in
their threatened application to Counterclaimant in the
case at bar. The allegations are presented questions of actual
facts establish that there are parties involving substantial
controversy between the parties referred on this Court for the reso-
lution of constitutional issues herein pre-
sented by Title 28, U.S.C.A. Section 1339 which provides
in pertinent part:

"The District Court shall have original jurisdiction
of any civil action arising under any act of Congress
relating to the postal service"

as well as *Title 28, U.S.C.A., Section 1331A* and *Article III, Section 2* of the *Constitution of the United States*.

3. Counterclaimant applies to have a Three-Judge Court convened under the provisions and procedures authorized by *Title 28, U.S.C.A. Sections 2282 and 2284*.

4. Prayer for declaratory relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure* as well as *Title 28, U.S.C.A., Section 2201* which provides in pertinent part:

"... any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . ."

5. The matters in controversy exceed the value of Ten Thousand Dollars (\$10,000.00) as will be more fully set out herein.

6. The Clerk is directed to give notice by registered or certified mail to The Honorable John Mitchell, Attorney General of the United States of America, and to The Honorable John W. Stokes, United States Attorney for the Northern District of Georgia, as is required under *Title 28, U.S.C.A., Section 2284, Subsection 2*.

II. Parties

7. The Book Bin, Inc., is a body corporate of the State of Georgia engaged in the sale, distribution and offering for sale of nudist magazines and male and female nude photo art publications, books and other presumptively protected First Amendment materials from its address at 267 Marietta Street, N.W., Atlanta, Georgia 30313 and Counterclaimant has been so engaged for all times relevant hereto.

8. The Honorable Winton M. Blount is named as a Defendant in his capacity as Postmaster General of the United States of America who has the responsibility for the supervision of the administration and institution of any actions under the postal laws of the United States of America including *Title 39, U.S.C.A., Sections 4006 and 4007*.

III. *Factual Allegations*

9. On or about June 10, 1969, there was served on the Counterclaimant a complaint instituted by the Assistant General Counsel, Mailability Division, Post Office Department, under *Title 39, U.S.C.A., Section 4006* styled "In Matter of the Complaint Against THE BOOK BIN at 123 Simpson Street, N.W., Atlanta, Georgia 30313, carried as P.O.D. Docket No. 3/23, together with a Motion for Expedited Proceeding, copy of the Order granting an expedited proceeding, and Notice of Hearing date for July 8, 1969. In addition, Counterclaimant was furnished with a copy of the magazine charged to be "obscene, lewd, lascivious, indecent, filthy or vile", to wit, "Models de France". Copies of all documents with the exception of the magazine are attached hereto collectively as Counterclaimant's *Exhibit A* in support of this complaint and the contents are incorporated herein by reference.

10. It would appear from the Exhibit attached to the complaint that the advertising brochure has been in the custody of the Post Office since February 4, 1969 (see initials and date at top of said brochure attached to the complaint).

11. That on or about Friday, June 13, 1969, there was served on The Book Bin, notice that the representative of the United States Attorney for the Northern District of Georgia would go before the United States District Court for the Northern District of Georgia on Monday, June 16, 1969, at 4:30 in the afternoon and seek to obtain a temporary restraining order against The Book Bin directing the retention of Counterclaimant's incoming mail by the Postmaster pending the conclusion of the statutory proceedings in any appeal therefrom under the statutory provisions of *Title 39, U.S.C.A. Section 4007(A)*.

IV. *Basis in Law for Relief*

12. The threatened conduct of the representatives of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control in seeking to suppress from the public material presumptively protected under the *First Amendment* to

the *Constitution of the United States* will dissipate the efforts of the Counterclaimant to have said material sold to and/or accepted by citizens of the State of Georgia as well as citizens of the other 49 states of the United States who may personally desire to purchase or receive said materials as is their constitutional right (*Stanley vs. State of Georgia*, 22 L. Ed. 2d 542—1969). The circular matter lists the names of publications without embellishment offering presumptively protected *First Amendment* materials to responsible individuals who make appropriate remittances of money therefor.

13. The conduct of the Postmaster General, his agents, servants, employees, attorneys and others acting under their direction and control in moving to suppress and threatening to suppress the said publication is a "prior restraint" condemned by the *Constitution of the United States*, more particularly the *First, Fourth and Fifth Amendments* thereto.

14. As a further result of the conduct of the Postmaster General, his agents, servants, employees, and attorneys, the Counterclaimant has been intimidated in its trade or business and will suffer loss of profits as well as substantial inference with Counterclaimant's advantageous business relations.

15. As a further result of the unconstitutional conduct of the Postmaster General, his agents, servants, employees and attorneys as aforesaid, Counterclaimant has been required to retain attorneys to defend Counterclaimant from the threatened actions of the Postmaster General, his agents, servants, employees and attorneys.

16. Counterclaimant has the right to engage in the business of offering for sale or profit, non-obscene magazines and books by authority of the *First Amendment* to the *Constitution of the United States* so long as it is done without engaging in the sort of gross pandering condemned by the Supreme Court of the United States in *Ginzburg vs. United States*, 383 U.S. 462.

17. The statutes, particularly *Title 39, U.S.C.A. Section 4006*, as written confer upon the Postmaster General, his agents, servants, employees and attorneys, virtually unbridled and absolute power to prohibit any use

through the mail by Counterclaimant of circulars offering for sale non-obscene nudist and girlie magazines to interested adult persons and said statute as written is further and invidious prior restraint on the constitutional rights of interested citizens and residents of the 50 states of the United States of America who may desire to purchase said magazines for whatever value it may have to them for either amusement purposes or through the communication of ideas, as well as to the Counterclaimant who desires to exercise its First Amendment rights to offer the same for sale and distribution to the interested public.

18. That the act of Congress catalogued under *Title 39, U.S.C.A. Section 4006* entitled " 'Unlawful' Matter," is unconstitutional on its face and repugnant to the *First, Fourth and Fifth Amendments* to the Constitution for the following reasons:

A) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such are repugnant to the Due Process provisions of the *Fifth Amendment* to the *Constitution of the United States*; and further,

B) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards for determining and regulating obscenity at variance with and in sufficient for those minimum standards prescribed by the United States Supreme Court in connection with publications presumptively protected under the *First Amendment*; and further,

C) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of federal constitutional rights of the citizens of the

United States who desire to purchase and receive such publications, as well as of Counterclaimant to distribute, circulate and/or sell said publications; and further,

D) Said statutory provisions are repugnant to the substantive Due Process provisions of the *Fifth Amendment* to the *United States Constitution* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary and capricious means on the part of the Postmaster General, his agents, servants and employees, without a showing of a real and substantial relationship to any subordinating interest which is compelling to justify federal action limiting *First Amendment* freedoms; and further,

E) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the *Fifth Amendment* to the *Constitution of the United States* by employing means lacking adequate safeguards which Due Process demands to assure non-obscene material the constitutional protection of the *First Amendment* to which it is entitled; and further,

F) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States* in that said statutory provisions permit inherent powers of censorship, suppression, and prior restraint by the Postmaster General of the United States, his agents, servants, employees, attorneys and others under his direction and control; and further,

G) Said statutory provisions are repugnant to the *First and Fifth Amendments* of the *Constitution of the United States* in that they fail to provide for any determination of mental element requisite to a constitutionally permissible suppression of alleged obscene materials.

19. That the act of Congress as codified under *Title 39, U.S.C.A. Section 4006* entitled " 'Unlawful' Matter"

is unconstitutional as applied and in its threatened application by the Postmaster General of the United States of America, his agents, servants, employees, attorneys and others under his direction and control, and is repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States of America*, in that:

A) The procedures as applied in the context of the protections for free speech and press secured under the *First Amendment* by the Postmaster General, his agents, servants, employees and attorneys, permit a suppression of presumptively protected printed matter without a prior judicially superintended adversary hearing for the purpose of determining whether said presumptively protected printed matter is obscene as a matter of law in the constitutional sense; thus depriving said Counterclaimant of rights under the *First and Fifth Amendments* to the *Constitution of the United States*; and said procedures as applied and as threatened to be applied *in futuro* under color of enforcement of said statutory provisions against Counterclaimant, fail to insure against the curtailment of constitutionally protected expression, and as such are void for impermissible overbreadth, and

B) The procedures as applied herein in the context of the constitutional protections afforded for free speech and press, and by the Postmaster General, his agents, servants and employees under the referenced statutory provisions, have the effect and threaten to have the effect of inhibiting the protected expression and abridging the right of the public to unrestricted circulation of presumptively protected non-obscene publications, as well as the right of Counterclaimant to circulate and distribute said publications on which there has been no final judicial determination of obscenity before suppression, and as such the statute as applied is void for impermissible overbreadth by means which sweep unnecessarily broadly and stifle fundamental rights and liberties afforded Counterclaimant and interested citizens of the United States, when the end can be more narrowly achieved under less drastic provi-

sions to serve a constitutionally proper federal government interest, and

C) The procedures as applied under the referenced statutory provisions by the Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, involve the use of terminology and standards by them under color of enforcement of the said statutory provisions which forbid or attempt to forbid Counterclaimant from the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and hence said provisions are constitutionally deficient and void for vagueness, and

D) The application of the referenced statute by the Postmaster General of the United States involves the use by him, his agents, servants, employees and attorneys and others under his direction and control of a statute which contains no element of "scienter" and unconstitutionally deprives Counterclaimant from the exercise of its *First Amendment* rights, without the constitutionally mandated requirement that Counterclaimant have the requisite "guilty knowledge", and

E) The Postmaster General of the United States, his agents, servants, employees and attorneys, and others under his direction and control, in the application of said statute have acted in an arbitrary, capricious and unreasonable manner in attempting to enforce said statutory provisions and said arbitrary, capricious and unreasonable actions are and were repugnant to the Counterclaimant's constitutional rights under the *First* and *Fifth Amendments* to the *Constitution of the United States*.

20. That the act of Congress as codified under *Title 39, U.S.C.A. Section 4007* is unconstitutional as written and as applied or in its threatened application by the Postmaster General of the United States, his agents, servants, employees and attorneys and others under his direction and control, in the case at bar is repugnant to

the *First, Fourth and Fifth Amendments* to the *Constitution of the United States* for each and any of the following reasons:

A) The said statutory provisions permit an *ex parte* temporary restraining order to be entered by the United States District Court on application by the Postmaster General requiring only probable cause before suppression of presumptively protected *First Amendment* materials, and

B) The exception created under said statutory provision is without foundation and deprivation of Counterclaimant's equal rights under the law.

21. That notwithstanding the patent unconstitutionality of *Title 39, U.S.C.A., Section 4006*, and the application of *Title 39, U.S.C.A., Section 4007*, in the context of the constitutional protections afforded free speech and press, there is further patent unconstitutionality in that after the full and complete hearing being requested by the Office of the General Counsel for the Post Office Department and final decision rendered by the judicial hearing officer, the burden of going forward in instituting appellate judicial review falls on the person who seeks to exercise his *First Amendment* rights and that this is repugnant to the *First and Fifth Amendments* to the *Constitution of the United States* and contrary to the teachings of *Freedman vs. Maryland*, 380 U.S. 51 at Page 60.

22. The Postmaster General, his agents, servants, employees, attorneys, and others under his direction or control know or should have known that pictorial representations of female nudes in a photo art magazine comparable to the publication "*Models de France*" have been held not to be obscene by multiple courts in the federal and state judicial system, and further, each of the Defendants know or should have known that the Supreme Court of the United States has ruled on pictorial representations of female nudes and held them not to be obscene in the constitutional sense as a matter of law, on numerous occasions since May 1967, citing as authority therefore, *Redrup vs. New York*, 386 U.S. 767. "*Model de France*" is not obscene as a matter of law in the Constitutional Sense.

23. That Counterclaimant has no plain, speedy or adequate remedy in law to avoid the suppression through administrative fiat by a judicial hearing officer who has already ruled that "the Postal Manual, *Section 821.331 (b)* deprives him of the authority to 'to determine the constitutionality of statutes.'" (See department decision in the matter of the complaint against The Mail Box, Post Office Docket No. 379, a copy of which is attached hereto as Counterclaimant's *Exhibit B* in support of its petition, the contents of which are incorporated herein by reference.

24. That "Models de France", alleged by the Postmaster General's representatives to be obscene, has not been judicially determined to be obscene after a judicially superintended adversary hearing involving Counterclaimant.

V. Relief Sought

25. Counterclaimant is entitled to and desires that this Court enter a declaratory judgment on hearing under the provisions of *Title 28, U.S.C.A., Section 2201 and Rule 57 of the Federal Rules of Civil Procedure* declaring the acts of Congress codified in *Title 39, U.S.C.A., Sections 4006 and 4007* to be repugnant to the Constitution of the United States as written on their face, or, in the alternative, unconstitutional as the same have been and are being applied or threatened to be applied to Counterclaimant herein.

26. The Counterclaimant is entitled to and desires that this court issue its interlocutory injunction restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them, and persons in active concern or participation with them from continuing the following unconstitutional and unlawful acts, to wit:

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A. Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First*

Amendment materials, pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and;

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department in the case styled:

"In the Matter of the Complaint Against:

THE BOOK BIN"

carried as P.O.D. Docket 3/23, now scheduled for expedited hearing at the request of the Assistant General Counsel, Mailability Division, before Peter R. Rosenblatt, Post Office Department Judicial Officer, on July 8, 1969, at 10:00 A.M.; pending final hearing and determination by the Courts of the Counterclaimants application for a Permanent Injunction and Declaratory Judgment.

27. Counterclaimant further is entitled to and applies for a permanent injunction restraining the Postmaster General of the United States, his agents, servants, employees and attorneys, and any and all other persons acting under his direction and control, and each of them and persons in active concert or participation with them; from:

A) enforcing or attempting to enforce *Title 39 U.S.C.A. Section 4006 and/or 4007*, on the ground that each statutory provision considered separately, alternately and conjunctively, as written or as the same has been applied and is threatened to be applied to Counterclaimant, is repugnant to the *First, Fourth and Fifth Amendments* to the *Constitution of the United States*; and

B) From further proceeding in any manner whatsoever in the matter now pending before the Post Office Department, *P.O.D. Docket No. 3/23* against Counterclaimant herein, except to move to dismiss the said Complaint therein.

28. That Counterclaimant upon its verified Complaint and Petition for an interlocutory and permanent injunc-

tion restraining the Postmaster General of the United States, his agents, servants, employees, attorneys and any and all other persons acting under his direction and control, from the enforcement, operation or execution of Acts of Congress for repugnance to the Constitution of the United States, either as written and/or in the application thereof to Counterclaimant; makes application for the convocation of a Three Judge Court as required by *Title 28, U.S.C.A. Section 2281*, and requests that the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to *Section 2284 of Title 28, U.S.C.A.*, on the presentation of Petitioner's application as aforesaid, in order that the necessary designation of Judges for said Court may be had for the determination of the substantial constitutional issues presented by this controversy. WHEREFORE, Counterclaimant prays:

1. That interlocutory injunction of this Court issue upon hearing, restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them from;

A) Instituting and/or docketing further proceedings against Counterclaimant under color of enforcement of *Title 39 U.S.C.A., Section 4006* to suppress the sale or circularization of magazines, books, pictures, and other presumptively protected *First Amendment* materials, and

B) From further proceeding in any manner whatsoever in the present Complaint before the Post Office Department under *P.O.D. Docket 3/23*, pending final hearing and determination by the Court of the Counterclaimant's application for a Permanent Injunction and Declaratory Judgment; and

2. That the Postmaster General be required to forthwith answer this Complaint in conformance with the rules and practices of this Honorable Court; and

3. That a declaratory judgment be rendered declaring that The Acts of Congress Codified as, *Title 39 U.S.C.A., Sections 4006 and/or 4007* considered separately, alternatively and conjunctively, as written or as the same have been applied and are threatened to be applied, are repugnant to the *Constitution of the United States*:

4. That a Three Judge Court be convened under law and issue it's Permanent injunction restraining and enjoining the Postmaster General, his agents, servants, employees and attorneys and any and all other persons acting under his direction and control, and each of them from:

A) Enforcing or attempting to enforce The Acts of Congress Codified as *Title 39 U.S.C.A., Section 4006 and/or 4007*, on the ground that each statutory provision considered separately, alternatively and conjunctively, as written or as the same have been applied and are threatened to be applied, are repugnant to the Constitution of the United States, and

B) From further proceeding in any manner whatsoever in the matter now pending before the Post Office Department under *P.O.D. Docket No. 3/23* against Counterclaimant herein, except to move to dismiss the said Complaint.

5. That the Clerk of Court give notice, by certified mail, of Counterclaimant's application for Preliminary Injunction, Complaint and Notice of Hearing, to the Honorable, John N. Mitchell, Attorney General of The United States of America, as such notice is required by law; and

6. That Counterclaimant have such other and further relief as may be appropriate under the circumstances of this case.

Respectfully submitted:

/s/ Hugh W. Gibert
 HUGH W. GIBERT
 Suite 2709, First National Bank Bldg.
 Atlanta, Georgia, 30303
 Attorney for Counterclaimant

/s/ Robert Eugene Smith
 ROBERT EUGENE SMITH
 Suite 507—The Alex. Brown & Sons Bldg.
 102 West Pennsylvania Avenue,
 Towson, Maryland 21204
 Area Code (301) 821-6868
 Of Counsel for Counter Claimant

AFFIDAVIT

COUNTY OF FULTON)
) SS:
 STATE OF GEORGIA)

Before me, the undersigned, a Notary Public, in and for the County and State aforesaid, this 17th day of June, 1969, did personally appear, R. D. Underhill, an individual known to me, who after being duly sworn, did depose and state that he is the Vice President of the body corporate of the State of Georgia, known as The Book Bin, Inc., and that he is authorized to make oath on behalf of the Corporation, and he affirms that the factual allegations in *Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court*, are true and correct to the best of his information, knowledge and belief.

THE BOOK BIN, INC.

By: /s/ R. D. Underhill
 R. D. UNDERHILL
 Vice President
 Counterclaimant

Sworn to and Subscribed Before Me on the Date and Place First Above Mentioned:

/s/ Alice J. Saxe
 Notary Public,
 Georgia, State at Large
 My Commission Expires
 April 27, 1973

CERTIFICATE OF SERVICE

COUNTY OF FULTON:

STATE OF GEORGIA

A copy of Counterclaimant's Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court, has been personally served this 17th day of June, A.D. 1969, by the undersigner, on the Office of the United States Attorney for the Northern District of Georgia, 402 Old Post Office Building, Atlanta, Georgia, 30301, Attorneys for Plaintiffs, the United States of America and the Postmaster General of the United States; to the attention of Charles B. Lewis, Jr., Esquire, Assistant United States Attorney.

/s/ Robert Eugene Smith
ROBERT EUGENE SMITH
Of Counsel to
The Book Bin, Inc.
Counterclaimant

Sworn to and Subscribed Before Me the Undersigned,
a Notary Public in and for the County and State Afore-
said, This 17th Day of June, A.D. 1969.

/s/ Alice J. Saxe
Notary Public,
Georgia, State at Large
My Commission Expires
April 27, 1973

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Civil Action Number 12,812

UNITED STATES OF AMERICA and
THE POSTMASTER GENERAL, PLAINTIFFS

vs.

THE BOOK BIN, INC., DEFENDANT

MOTION TO DISMISS DEFENDANT'S "MOTION FOR INTER-
LOCUTORY INJUNCTION" AND DEFENDANT'S "PETITION
FOR INTERLOCUTORY AND PERMANENT INJUNCTION
AND APPLICATION FOR THREE-JUDGE COURT"

[Filed June 23, 1969]

Now comes the United States of America, by and through counsel, and moves to dismiss Defendant's "Motion for Interlocutory Injunction" and "Counterclaimant's Petition for Application for Three-Judge Court". This motion is made on the following grounds:

1.

Although these motions are styled in the nature of a Counterclaimant, they go beyond the scope of the nature of the relief sought in Plaintiff's action. Plaintiff's action is brought under 39 U.S.C. 4007 for a preliminary injunction and temporary restraining order pending a decision in this matter by the Postmaster General. Defendant has attempted to fully respond to Plaintiff's action by his motion to dismiss complaint and temporary restraining order. That motion should be determined on its merits. However, he goes further and seeks to have the Postmaster General enjoined from taking action under 39 U.S.C. 4006. In order to take such action, he should be required to institute a separate civil action and should not be allowed to initiate a completely distinct proceeding under the guise of a counterclaim in this

action. See *Thompson v. United States* (1961) 291 F.2d 67.

2.

The Defendant has prematurely sought this relief. No order has been entered against him by the Postmaster General and he is not entitled to injunctive relief prior to the administrative proceedings which are scheduled for July 8, 1969. *Toilet Goods, Inc. v. Gardner* (1967) 387 U.S. 158. Furthermore, Defendant has not shown that he will suffer irreparable harm unless injunctive relief is granted prior to the administrative proceedings. His mail relating to orders and remittances for obscene literature will merely be detained until the Postmaster General has acted. If the Postmaster General renders a decision in his favor, the mail will be delivered to him. See *Sperry and Hutchinson v. Federal Trade Commission*, 256 F. Supp. 136, 141-142; *Myers v. Bethlehem Shipbuilders Corp.* (1938) 303 U.S. 41; *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111.

WHEREFORE, the United States prays that Defendant's Motion for Interlocutory Injunction and Defendant's Counterclaim Petition for Interlocutory and Permanent Injunction and Application for Three-Judge Court be dismissed.

/s/ John W. Stokes, Jr.
JOHN W. STOKES, JR.
United States Attorney

/s/ Charles B. Lewis, Jr.
CHARLES B. LEWIS, JR.
Assistant United States
Attorney

CERTIFICATE OF SERVICE

I, Charles B. Lewis, Jr., Assistant United States Attorney, Northern District of Georgia, do hereby certify that I have served a copy of the above and foregoing motion on attorney for Defendant by personally handing same to him.

This 23rd day of June, 1969.

/s/ Charles B. Lewis, Jr.
CHARLES B. LEWIS, JR.
Assistant United States
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[[Caption Omitted]]

[[Filed June 23, 1969]]

- (1) Requesting Judge: Honorable FRANK A. HOOPER
Northern District of Georgia
- (2) District Judge: Honorable NEWELL EDENFIELD
Northern District of Georgia
- (3) Circuit Judge: Honorable LEWIS R. MORGAN
- (4) Date of Order: June 20, 1969

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12812

UNITED STATES OF AMERICA and
THE POSTMASTER GENERAL

vs.

THE BOOK BIN

[Filed Sept. 9, 1969]

Before: MORGAN, Circuit Judge, and EDENFIELD and
HOOPER, District Judges.

EDENFIELD, District Judge:

The issue before this three-judge court is the constitutionality of 39 U.S.C. §§ 4006, 4007, under which the Postmaster General acts to curb the flow of allegedly obscene materials through the mails.

On or about June 10, 1969, a complaint was served on the defendant by a representative of the Postmaster General under 39 U.S.C. § 4006, charging that the magazine "Models of France", distributed by defendant, was obscene. An order granting an expedited proceeding was attached, setting a hearing for July 8, 1969, which has since been postponed indefinitely. On June 13, 1969, the United States notified defendant that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. § 4007, in the United States District Court for the Northern District of Georgia. Under § 4007, a court, upon a showing of probable cause that the obscenity statute has been violated, may direct the detention of all of a defendant's incoming mail, pending the conclusion of the § 4006 proceedings and any appeal therefrom. By way of answer and counterclaim, defendant has challenged the statutory scheme employed under §§ 4006, 4007. A three-judge court was convened

to consider this constitutional challenge. At oral hearing, the Government recognized the desirability of an immediate determination of the constitutional questions.

Under § 4006:

"Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances or money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representatives, to return the registered letters or other letters or mail to the sender marked 'Unlawful'; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes."

Thus, upon an administrative finding by the Postmaster General that the defendant is sending obscene material through the mail, all of his incoming mail may be marked unlawful and returned to the senders, and the Postmaster General may forbid payment of any money orders or postal notes drawn to his name and likewise return them to the senders.

However, prior to 1956, the Postmaster had no authority to prevent the delivery of mail to the suspected offender during the pendency of the statutory [§ 4006] proceedings. "As a result, the person against whom such a mail block was finally imposed had frequently reaped the harvest from his illegal activity and, mail addressed to one location having been blocked, simply launched a

similar activity at a new address." Senate Report No. 1818, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246.

To remedy this situation, the Postmaster General in 1956 received congressional authority to enter an order permitting the temporary, 20-day, impounding of a defendant's incoming mail pending culmination of statutory proceedings and appeal, if necessary to the enforcement of § 4006. The United States District Court could extend the period of detention upon the petition of the Postmaster General. Because of the hardship imposed by the 20-day limitation, the Post Office Department requested—and a House of Representatives bill granted—a 45-day period of detention of a defendant's incoming mail, after which an extension could be obtained by a United States District Court order. However, in 1960, the Congress adopted a Senate measure which removed the arbitrary time limit on detention pending § 4006 action, by substituting a judicial injunction permitting detention throughout the course of the statutory proceedings under § 4006. The 1960 bill, now § 4007, was designed to insure "court supervision of the exercise of the power to detain mail" coming to the defendant. See, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246; *Manual Enterprises v. Day*, 370 U.S. 478, 512-519 (1962) (Brennan, J., concurring). Section 4007 provides, in pertinent part:

"(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the de-

defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings."

Section 4007 thus complements § 4006, *see*, 39 C.F.R. § 952.6, and the two sections should be interpreted together. For reasons set out below, we find this statutory scheme violative of the First Amendment to the United States Constitution.

First, under § 4007, the United States can obtain a court order detaining *all* of the incoming mail to the defendant. The breadth of this section goes far beyond merely maintaining the status quo. While the defendant may secure delivery of mail which is clearly "not connected with the alleged unlawful activity", the statute imposes an affirmative obligation upon him to examine the mail and demonstrate its non-connection. This obligation to come from under an overly broad statutory imposition puts an unconstitutional restraint on the defendant's First Amendment rights. Thus, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court considered a procedure under which the Postmaster General could withhold communist political propaganda sent to an addressee—as well as similar material sent in the future, if the addressee did not return a card to the post office within 20 days of its receipt. In order to receive the mail, the addressee had to request in writing on the card that it be delivered. This procedure was struck down because, as in the instant action, "[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect. . . ." *Lamont v. Postmaster General*, *supra*, at 307. Justice Brennan, in a concurrence, recognized that the consequence of inaction by the addressee was not only nondelivery of the material in question, but "a denial of access to like publications which he may desire to receive." 381 U.S. at 309. Like the procedures considered in *Lamont*, § 4007 suffers both from a fatal overbreadth

of reach, in detaining all incoming mail, and from imposition of an unwarranted affirmative obligation on the defendant to remove mail unrelated to the alleged obscenity in question. It disrupts, rather than maintains, the status quo, pending post office action in § 4006.

Second, the procedures established in §§ 4006, 4007, do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman v. Maryland*, 380 U.S. 51 (1965) (per Brennan, J.), establishes the litmus tests by which we should be guided in cases such as this. There the Supreme Court recognized, as it had before, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), that prior submission of material to agency censorship action was not per se unconstitutional under proper safeguards. To avoid First Amendment problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under §§ 4006, 4007, fall short of meeting these rigid requirements.

Under these sections, no restraint is generally imposed under § 4006 until a § 4007 judicial order is obtained. However, under § 4007, the court must issue a restraining order merely upon a showing of "probable cause." This judicial determination of probable cause is not binding in any way on the administrative decision in § 4006. Section 4007 specifically provides, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." Indeed, this quoted passage was inserted at the behest of the Postmaster General to "guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter, Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U. S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at

3249. If a United States District Court fails to find probable cause, as it often will, the Postmaster General could still find a violation of § 4006 and impose the restrictions pursuant to that section, without any prior judicial hearing on obscenity. Moreover, it is doubtful if the limited judicial finding implicit in the grant of a § 4007 finding insulates the procedure from constitutional infirmity, since the court issues its order merely on a finding of probable cause, not an actual determination of obscenity. Thus, the statutory scheme effectively operates as a prior restraint.

While prior restraints are not per se indefensible, they bear a heavy presumption of invalidity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). This presumptive invalidity is not overcome in the instant case by carefully drawn safeguards. Contrast, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The administrative procedures established by regulation under § 4006, see 39 C.F.R. §§ 952.1-952.33, do not provide the procedural safeguards envisioned by *Freedman* and succeeding Supreme Court cases. Thus, in *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968), a 50- to 57-day delay between initiation of administrative procedures and institution of judicial proceedings in a censorship action was found to be violative of First Amendment rights. In *Freedman* itself, a delay of four months in securing initial judicial determination and six months in obtaining final appellate review was condemned. 380 U.S. at 55. Compare, *United States v. One Carton Positive Motion Picture Film*, 247 F.Supp. 450 (S.D.N.Y. 1965), *rev'd. on other grounds*, 367 F.2d 889 (2d Cir. 1966). Under the instant procedures, a hearing date under § 4006 must be provided, "[w]henever practicable . . . within 30 days of the date of the notice" of the hearing. 39 C.F.R. § 952.7. In the instant case a hearing was set four weeks after service of the complaint against the defendant, although it has since been postponed. After an administrative hearing, the Post Office hearing examiner is required only to issue a report with "all due speed." 39 C.F.R. § 952.24. If the

hearing examiner finds against the defendant, an appeal must be taken to exhaust administrative remedies, within 15 days of the examiner's decision. 39 C.F.R. § 952.25. There is no deadline for the decision on administrative appeal. Moreover, 39 C.F.R. § 952.27 provides for the filing of a motion for reconsideration of a final Departmental decision.

During this protracted procedure, all of the defendant's mail may be detained if a § 4007 order has been obtained—with only a judicial decision of probable cause of obscenity. Even if the court failed to find probable cause and did not issue a § 4007 order, the defendant would be dissuaded from soliciting orders and distributing the challenged material, because of the possibility that remittances for the material would be withheld once § 4006 administrative action was complete. This chilling inhibition on First Amendment rights during the pendency of lengthy administrative procedures cannot withstand constitutional assault. An inhibition as well as a prohibition are equally denied to the Government in the First Amendment area. *Lamont v. Postmaster General*, supra, at 309 (Brennan, J., concurring); see, also, *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Moreover, if the final administrative decision is against him, the defendant, under the Administrative Procedure Act, must institute judicial review and has the burden of demonstrating that no substantial evidence exists to support the Postmaster's finding of obscenity. This is too great an imposition of defendant's First Amendment rights. See, especially, *Freedman v. Maryland*, supra, 380 U.S. at 59-60, where such a burden was found unacceptable. Compare *United States v. One Carton*, supra, at 458, where the court upheld the constitutionality of § 305 of the Tariff Act, because, in part, the defendant there did not bear the burden of securing a judicial determination of obscenity; rather the burden was thrust on the Government. See, also, *United States v. Magazine Entitled "Hellenic Sun"*, 253 F.Supp. 498 (D.Md. 1966), *aff'd.*, 373 F.2d 633 (4th Cir. 1967). The application of the Postmaster General here for an injunction under § 4007 does not correct this constitutional flaw in the

instant statutory network. As noted, § 4007 does not permit a full judicial finding on obscenity, but restricts a court to a finding of probable cause. Moreover, even if a court found the material in question non-obscene and failed to issue a § 4007 order, the Postmaster would not be barred from proceeding under § 4006, with the attendant restraints discussed.

Thus, in short, action under § 4006-7 may be taken which goes beyond preservation of the status quo, which fails to assure a prompt administrative decision, and which thrusts the requirement of a judicial determination on the defendant.

Third, contrary to the Government's central argument, the statutes impose a direct restraint on the distribution of the allegedly obscene materials. We reject the Government's argument that its actions are aimed only at remittances, not at distribution of obscene materials. See, *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting); *Stanard v. Olesen*, 74 S.Ct. 768, 771 (1954) (Douglas, J., as Circuit Judge). Any action aimed at remittances received for material will have a direct restraint on distribution of the material itself. A defendant is likely to restrict or end distribution of material as to which a § 4007 order has been obtained, or as to which a § 4006 proceeding is pending. The United States may not accomplish by indirection, through action against remittances, what it cannot do directly. The United States urges that the predecessor to § 4006 has been upheld against constitutional assault by the courts. However, the decisions cited either go off on other grounds or give little if any consideration to the constitutional issue raised. Thus, in *Tourlanes Publishing Co. v. Summerfield*, 231 F.2d 773 (D.C.A. 1956), cert. denied, 352 U.S. 912, cited by the United States, the court specifically stated they were not reaching the "difficult constitutional issues raised" by the cross-appeal, concerning the Postmaster General's refusal to deliver all of Tourlanes' mail. 231 F.2d at 775. *Glanzman v. Finkle*, 150 F.Supp. 823 (E.D.N.Y. 1957), assumes the constitutionality of the predecessor to § 4006, citing *Summerfield v. Sunshine Book Co.*, 211 F.2d 42 (D.C.A.

1954), *cert. denied*, 349 U.S. 921, yet the latter case, also cited by the Government, did not fully consider the constitutional questions, 221 F.2d at 48, but concentrated on the breadth of the Postmaster's order. Moreover, these preceded *Freeman v. Maryland*, *supra*, and many of the other cases imposing strict procedural requirements on Government censorship. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Poulos v. Rucker*, 288 F.Supp. 305 (M.D.Ala. 1968); *Cambist Films, Inc. v. Tribell*, 293 F.Supp. 407 (E.D.Ky. 1968); *Cambist Films, Inc. v. State of Illinois*, 292 F.Supp. 185 (N.D.Ill. 1968); *Metzger v. Percy*, 393 F.2d 202 (7th Cir. 1968); *Tyrone, Inc. v. Wilkinson*, 294 F.Supp. 1330 (E.D.Va. 1969); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968). The most recent court to consider § 4006, a three-judge court in *Rizzi v. Blount*, No. 69-64-R, June 10, 1969, C.D. Cal. (per curiam), held it unconstitutional on its face as contrary to *Freedman*, *supra*, and *Lamont*, *supra*. Our discussion here concerning §§ 4006, 4007, supports that court's conclusion.

We understand the concern of Congress and the Post Office to restrict the flow of obscenity through the mails. It may perhaps be true that criminal punishment for mailing obscenity under 18 U.S.C. § 1461 is an inadequate weapon in the Postmaster General's arsenal. However, it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked.

In the instant case, the defendant can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by his own initiative. During the interim, the prolonged threat of an adverse administration decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of defendant's first Amendment rights—all without a *final* judicial determination of obscenity. Judicial participation in the finding of obscenity

under the statutory scheme here is either too little (§ 4007) or too late (§ 4006).

The statutory scheme is unconstitutional and we therefore GRANT defendant's motion to dismiss and its counterclaim.

This 8th day of September, 1969.

/s/ Lewis R. Morgan
LEWIS R. MORGAN
United States Circuit Judge

/s/ Newell Edenfield
NEWELL EDENFIELD
United States District Judge

/s/ Frank A. Hooper
FRANK A. HOOPER
United States Senior
District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 12812

UNITED STATES OF AMERICA and
THE POSTMASTER GENERAL

vs.

THE BOOK BIN

JUDGMENT

This action came on for hearing before the Court, Honorable Lewis R. Morgan, U. S. Circuit Judge, and Honorable Newell Edenfield and Honorable Frank A. Hooper, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendant's motion to dismiss and its counterclaim,

It is Ordered and Adjudged that judgment is hereby entered for the defendant, THE BOOK BIN, and against plaintiffs, UNITED STATES OF AMERICA and THE POSTMASTER GENERAL; and that the defendant recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 16th day of October, 1969.

CLAUDE L. GOZA
Clerk of Court

By: /s/ Ruth M. Stilwell
Deputy Clerk

Filed and entered in Clerk's Office

October 16, 1969

CLAUDE L. GOZA
Clerk

By: /s/ Ruth M. Stilwell
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT

[Filed Oct. 16, 1969]

Notice is hereby given that the United States of America, and The Postmaster General, Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on October 16, 1969.

/s/ John W. Stokes, Jr.
JOHN W. STOKES, JR.
United States Attorney

/s/ Charles B. Lewis, Jr.
CHARLES B. LEWIS, JR.
Assistant United States
Attorney

SUPREME COURT OF THE UNITED STATES

No. 812, October Term, 1969

UNITED STATES, ET AL., APPELLANTS

v.

THE BOOK BIN

APPEAL FROM the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 788.

March 2, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES, AND EVERETT T. CARPENTER, POST-
MASTER OF THE CITY OF LOS ANGELES, STATE OF
CALIFORNIA, APPELLANTS

v.

TONY RIZZI, D/B/A THE MAIL BOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

No.

UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL, APPELLANTS

v.

THE BOOK BIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The memorandum opinion and order of the United
States District Court for the Central District of Cali-

fornia (App. A, *infra*, pp. 15-17) (*The Mail Box*) is not yet reported. The opinion of the United States District Court for the Northern District of Georgia (App. B, *infra*, pp. 46-56) (*Book Bin*) is not yet reported.

JURISDICTION

The judgment of the three-judge district court in *The Mail Box* declaring 39 U.S.C. 4006 unconstitutional and enjoining the Postmaster General and the Postmaster of Los Angeles from enforcing an order thereunder was entered on August 1, 1969 (App. A, p. 21). A notice of appeal was filed on September 2, 1969.

The judgment of the three-judge district court in *Book Bin* dismissing the action brought by the United States for an order pursuant to 39 U.S.C. 4007, enjoining the Postmaster General from conducting proceedings pursuant to 39 U.S.C. 4006, and declaring 39 U.S.C. 4006 and 4007 unconstitutional was entered on October 16, 1969 (App. B, p. 57). A notice of appeal was filed that day.

The jurisdiction of this Court over both appeals is conferred by 28 U.S.C. 1252 and 1253. *Zemel v. Rusk*, 381 U.S. 1.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. 4006 is unconstitutional on its face.
2. Whether 39 U.S.C. 4007 is unconstitutional when invoked in aid of proceedings for the enforcement of 39 U.S.C. 4006.

STATUTES AND REGULATIONS INVOLVED

Sections 4006 and 4007 of Title 39, together with the Post Office Department regulations relevant to their use, are set out in Appendix C, *infra*, pp. 58 ff.

STATEMENT

The Mail Box and The Book Bin are alleged to be the retail distributors of picture magazines consisting almost entirely of photographs of women exposing their pudenda. The two distributors allegedly use the United States mails to disseminate illustrated advertisements for the magazines, to receive orders for them, and to effect their distribution. Both distributors were subjected to administrative actions seeking to invoke the remedies of 39 U.S.C. 4006, 4007, as to some of the magazines they publish, on the ground that the magazines were obscene.

Under 39 U.S.C. 4006, the Postmaster General may stamp as "unlawful" and return to the senders letters addressed to a person, and may prohibit the payment of postal money orders to that person, if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance" or is using the mails to distribute information as to how such items may be obtained. The provision is parallel to, and is administered in the identical manner as, 39 U.S.C. 4005, relating to the use of the mails to promote frauds and lotteries. See *Donaldson v. Read Magazine*, 333 U.S. 178. Administrative procedures applicable to both sections, 39 C.F.R. 952.1 *et seq.*, stress the

need for expedition, *e.g.*, *id.* at 952.7, 952.13, 952.24(a), and comply with the Administrative Procedure Act.¹ Under these procedures, an order does not take effect until the administrative proceedings have been concluded, *id.* at 952.28, but the Post Office is not required to seek judicial enforcement.

Section 4007 is a general provision applicable to both Section 4006 and Section 4005, and establishes a procedure by which the Postmaster General may secure interim relief during the pendency of administrative proceedings. It authorizes the United States District Court for the district in which a person receives mail to direct the temporary detention of the person's incoming mail "pending the conclusion of the statutory proceedings and any appeal therefrom" upon a showing of probable cause to believe that the statute is being violated. It further provides that the determination under the section "does not affect or determine any fact at issue in the statutory proceedings."

In both of the present cases, the Postmaster General initiated administrative proceedings under Section 4006 and at the same time commenced actions in the appropriate district court for a Section 4007 order directing the temporary detention of mail pending completion of the administrative proceedings. In *The Mail Box*, the United States District Court for the

¹ Thus, the regulations provide for written complaint and notice of hearing, 952.5, 952.7, 952.8, a trial-type administrative proceeding, 952.9-952.22, before an impartial hearing examiner, 952.17, 39 U.S.C. 308a, 39 C.F.R. 821.3(c)(1), a written opinion, 952.23-952.24, and an administrative appeal, 952.25.

Central District of California granted a temporary restraining order to that effect December 3, 1968, and a preliminary injunction December 18, 1968; the administrative proceedings were concluded December 31, 1968, by a finding of the Judicial Officer that the magazines there involved were obscene. App. A, pp. 23-41, *infra*. Section 4006 orders were entered accordingly, App. A, pp. 41-45, *infra*, and appellee Rizzi then brought the present action for injunctive relief against enforcement of the order and Section 4006 generally. A three-judge district court was convened and ruled in Rizzi's favor solely on the ground that Section 4006 is unconstitutional on its face.

In *Book Bin*, the appellee counterclaimed to the government's action for a Section 4007 order in the United States District Court for the Northern District of Georgia, seeking an injunction against enforcement of that section and Section 4006 on constitutional grounds. A three-judge district court was convened and granted the relief appellee requested, again solely on the ground that the two provisions are unconstitutional.

In each case, the court held the statute unconstitutional principally in reliance on *Freedman v. Maryland*, 380 U.S. 51, where this Court invalidated a State motion picture censorship system under which the State administratively could prohibit the exhibition of unlicensed motion pictures without a prior, prompt judicial determination of obscenity.

THE QUESTIONS ARE SUBSTANTIAL

In these cases, lower federal courts have struck down on First Amendment grounds an important Act

of Congress designed to effectuate a proper legislative purpose, namely, curbing the commercial exploitation of pornographic matter through the mails.² Plenary review by this Court is manifestly appropriate, especially since the same statutory arrangement has repeatedly been approved by this Court as applied to lotteries and frauds carried through the mails. *E.g.*, *Donaldson v. Read Magazine*, 333 U.S. 178; *Public Clearing House v. Coyne*, 194 U.S. 497. This Court has recognized that, like speech or writing which perpetrates a fraud, *ibid.*, and commercial advertising generally, *Valentine v. Chrestensen*, 316 U.S. 52, 54, ostensible "speech" commercially exploitative of a prurient interest in sex is subject to regulation. *Roth v. United States*, 354 U.S. 476; *Ginzburg v. United States*, 383 U.S. 463. While the fact that obscenity is subject to regulation could not save an overly broad statute, or one that failed to provide for timely judicial participation, we believe the courts below overlooked significant differences between the procedures involved in these cases and the prior decisions of this Court on which they relied in deciding that the flaws of overbreadth and failure to involve the judiciary were present here.

1. The objections to Section 4006 were that it fails to provide for prompt, judicial resolution of the question of obscenity, *Freedman v. Maryland*, 380 U.S. 51, and that it chills the publication of protected speech

² In *United States v. Hiatt*, pending on petition for certiorari, No. 762, this Term, a lower court held unconstitutional, also on First Amendment grounds, another federal statute relating to the use of the mails.

by threatening the withholding of remittances during the period between the administrative determination of obscenity and judicial review. But this is not a case like *Freedman*, where a Board created only for the purpose of censorship was to examine and approve any movie before it could be shown. The Post Office was not created for the business of censorship. Here, an impartial judicial officer,³ in a hearing affording all elements of administrative due process, must be persuaded that the matter in question is affirmatively obscene before any administrative action can be taken. While the subsequent judicial review proceedings would be limited to the administrative record, the regulations make clear that that record will be full and precise, 39 C.F.R. 952.18-952.22, and that there will be as full an exposition of the hearing officer's reasoning as would result from a trial in district court. 39 C.F.R. 952.24. Moreover, on review the court would have the same freedom and responsibility as this Court traditionally exercises in obscenity cases to review for itself the materials in question and determine whether they could support the determination made. The procedure thus affords all the essentials of judicial determination of the obscenity issue.

We believe this may suffice to demonstrate the constitutionality of the statute. If serious question remains, however, regarding the fact and timing of judicial involvement in its enforcement, there is a limiting construction available to meet those doubts and thus avoid

³ The hearing officer may be either a federal hearing examiner or the Department's Judicial Officer, 39 C.F.R. 952.17. In the latter event, there is ordinarily no administrative appeal.

invalidating the entire scheme. In enacting what is now Section 4007 in 1960, the Congress considered but rejected a request by the Postmaster General to make clear that appeal proceedings would not operate as a stay of a Section 4006 order in cases where interim judicial intervention under Section 4007 either had not been sought or had been denied. S. Rep. No. 1818, 86th Cong., 2d Sess. (1960), p. 5. Section 4007 authorizes an order of temporary detention to be in effect "pending the conclusion of the statutory proceedings *and any appeal therefrom*" (emphasis supplied). On the floor of the Senate, its sponsor stressed that "The bill places the responsibility for the detention of mail upon the courts instead of on an appointive officer," 106 Cong. Rec. 15428 (1960), and expressed a general desire to create a statutory procedure which would meet constitutional requirements while permitting effective regulation of use of the mails for commercial dealings in pornography.

In these circumstances, and to avoid constitutional doubts, we believe it would be appropriate to treat any appeal of a Section 4006 order as automatically staying its effect, where a Section 4007 judicial order for temporary detention of mail was not then in effect.⁴ While this construction does require the mailer to take the initiative of filing an appeal from the administrative order, we do not believe that a burden so slight taints the statutory scheme. Under this construction, there would be practical assurance that ad-

⁴ In the absence of such doubts, for example under Section 4005, no such construction would be necessary or appropriate.

ministrative action would have no effect until it received judicial endorsement. Unlike *Freedman*, where the movie could not be released until approval was obtained, appellees would continue to receive mail until a block was judicially ordered.

2. The attack on Section 4007 is premised chiefly on the contention that the finding of "probable cause" which that statute requires to justify a temporary mail detention order is insufficient to justify the effect of such an order on the exercise of First Amendment rights. Again, however, a limiting construction would be available to avoid any doubts. This construction would require that, in order to determine whether or not "probable cause" exists, the district judge examine the articles, remittances for which are sought to be blocked. While the proceeding is not adversary in the full sense, the judge's examination of the materials themselves can be as thorough as if he were passing on the merits. Since this Court has indicated that there is only a limited class of material which permissibly may be deemed obscene, a class which in the main is identifiable upon examination, e.g., *Redrup v. New York*, 386 U.S. 767, it would be possible to require the judge passing on the issue of probable cause to determine whether or not, on its face, the material is in that class. To be sure, there would remain the possibility that "redeeming social importance" or some other saving characteristic not apparent on the face of the materials themselves would appear at the hearing on the merits; but in view of the present judicial definition of constitu-

tionally proscribable obscenity, that possibility is slight as to any material which, upon inspection, *prima facie* is in the proscribable class.⁵

3. Finally, there is the question whether the statutes impermissibly chill the exercise of protected First Amendment rights. The Georgia district court appears to have found such a chill in two respects: first, in discouraging commercial publication of materials through the prospect that receipt of proceeds for those materials would be blocked; and second, by requiring the person subject to a temporary or permanent mail block to come forward and identify mail *not* subject to the block in order to receive it.

If the procedures of Sections 4006 and 4007 are not impermissibly vague, and meet the requirements of judicial determination of obscenity and expedition of procedure following adverse action,⁶ their enforce-

⁵ Under the Post Office rules, the hearing on the merits would be concluded and a determination made within a very short time after a Section 4007 order was entered. In *The Mail Box*, for example, less than 30 days elapsed. The matter is in any event subject to the control of the district judge issuing the temporary order. It would be appropriate, for example, for him to review his order upon a defendant's motion after conclusion of administrative proceedings resulting in a mail block order, and to determine whether it should remain in effect during the appeal.

⁶ Although the issue is not presented on the facts here, there appears to be some question whether the *Freedman* requirement of promptness applies to all proceedings involving obscenity questions, or only to those following some official action which, as in *Freedman*, prevents further publication until obscenity questions are resolved. We would argue that the requirement applies only where speech is actually blocked—for example, that there is no obligation of speedier trial of criminal obscenity prosecutions than other criminal prosecutions. Accordingly, Sec-

ment could not be blocked simply because persons subject to them feared their use. The logic of such an argument would equally foreclose criminal prosecution for sale of obscene matter; the point is that Congress is entitled to chill publication by persons who violate the obscenity laws so long as it does so in language sufficiently precise, as it has here. Indeed, this Court has held that in the area of commercial exploitation of pornography, materials may be the basis of prosecution or restraint even though the materials in themselves "cannot be adjudged obscene in the abstract." *Ginzburg v. United States*, 383 U.S. 463, 474.

In finding the requirement to come forward and identify unblocked mail objectionable, the courts below relied principally on *Lamont v. Postmaster General*, 381 U.S. 301. But there are significant differences between that case, which involved no unlawful activity on the recipient's part, and these, where the mail block is imposed only after an adjudication of the existence or likely existence of behavior which Congress constitutionally may declare unlawful, *Roth, supra*. Whether Congress constitutionally may thus close the mails to commerce in obscenity is at least an open question, *Manual Enterprises, Inc. v. Day*, 370 U.S.

tion 4006 presents no problems of promptness on our reading, since an appealed order under that section would never be enforced prior to judicial decision of the appeal. A Section 4007 order is obtained through judicial process, and appealable as any preliminary injunction would be; as noted above, n. 5, the determination on the merits which the Post Office must make will occur within a very short time after such an order is entered.

478, 512, 518 (Brennan, J., concurring) too significant to be deemed to have been decided *sub silentio* in *Lamont*. If Congress can thus close the mails, then it must be able to take prompt, effective steps in that direction, for most of the business in response to pandering advertisements is obtained within a matter of weeks. S. Rep. No. 1818, *supra*, at 2. The need for effective action to vindicate an important community interest in use of the mails was a factor essentially missing from *Lamont*, where the apparent congressional rationale was to protect a recipient from mail he was presumed not to want.

The question of overbreadth in a mail block order was before this Court in *Donaldson v. Read Magazine, supra*, and the Court found it insufficient to invalidate the statute on its face. There, a broad mail block order had been entered initially, and respondents attacked it in part for the reason relied on below—that it would hinder their receipt of mail the government had no right to interfere with. Pending reargument after this Court had invited discussion of the breadth of the order, the Postmaster General modified the scope of the order to block only those letters most likely, from the form of address used, to be in response to the fraudulent scheme. The Court approved the modification, 333 U.S. at 182–185, and then rejected a sweeping constitutional attack on the statute. *Id.* at 189–192. It was evidently of the opinion, correct in our view, that any objectionable overbreadth in a mail block order would reflect an infirmity, not

in the statute, but in the order.⁷ Commercial publishing houses, like Read Magazine, frequently give special, identifying address forms for use in particular transactions, such as the purchase of a magazine. Since an order can be tailored to such circumstances, the possibility that a particular order may be overbroad is insufficient to support the judgments below that Sections 4006 and 4007 are unconstitutional on their face.

CONCLUSION

Probable jurisdiction of these appeals should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,

Solicitor General.

WILLIAM D. RUCKELSHAUS,

Assistant Attorney General.

DAVID NELSON,

General Counsel,

United States Post Office.

OCTOBER 1969.

⁷One of the important factors involved is the statutory inviolability of first class mail, 39 U.S.C. 4057, which prevents postal officials from making their own inspection of mail addressed to any individual absent special circumstances not present here.

APPENDIX A

United States District Court for the Central District
of California

No. 69-64-R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX,
PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES OF AMERICA; AND EVERETT T. CAR-
PENTER, POSTMASTER OF THE CITY OF LOS ANGELES,
STATE OF CALIFORNIA, DEFENDANTS

Memorandum Opinion and Order

Before HUFSTEDLER, Circuit Judge, and CARR and
REAL, District Judges

PER CURIAM: Plaintiff brought this action for de-
claratory and injunctive relief against the Postmaster
General of the United States and the Postmaster of
the City of Los Angeles. Plaintiff alleges that 39
U.S.C. § 4006,¹ on its face, and as construed and

¹ 39 U.S.C. § 4006 provides:

"Upon evidence satisfactory to the Postmaster General that a
person is obtaining or attempting to obtain remittances of
money or property of any kind through the mail for an obscene,
lewd, lascivious, indecent, filthy, or vile article, matter, thing,
device, or substance, or is depositing or causing to be deposited
in the United States mail information as to where, how, or

applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth, Sixth, and Seventh Amendments of the United States Constitution. A three-judge District Court was convened pursuant to 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of the statute.

The statute authorizes the Postmaster General, after an administrative hearing, to decide whether mailed matter is obscene and further authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

The statute is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965), 380 U.S. 51. (Cf. *Lamont v. Postmaster General* (1965) 381 U.S. 301.) We have no occasion to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials claimed to be the subject of the administrative hearing.

Counsel for plaintiff is directed to prepare proposed findings of fact, conclusions of law, and judg-

from whom the same may be obtained, the Postmaster General may—

“(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked ‘unlawful’; and

“(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.”

ment, pursuant to Local Rule 7 of this court and the Federal Rules of Civil Procedure.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.

CHARLES H. CARR,
United States District Judge.

MANUEL L. REAL,
United States District Judge.

United States District Court for the Central District
of California

No. 69-64-R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX,
PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Findings of Fact and Conclusions of Law

THE ABOVE ENTITLED CAUSE came on regularly for hearing on plaintiff's motion for injunctive relief against the Postmaster General of the United States and the Postmaster of the City of North Hollywood, before the Honorable Shirley M. Hufstedler, Circuit Judge; and Honorables Charles H. Carr and Manuel L. Real, District Judges. Stanley Fleishman appeared for plaintiff, and Wm. Matthew Byrne, Jr., United States Attorney, by Larry Dier, Assistant United States Attorney, appeared for defendants.

The Court having heard oral argument, and having examined the file herein, and being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff Tony Rizzi, doing business as The Mail Box, is engaged in distributing by mail various publications.

II

Defendant Winton M. Blount is the Postmaster General of the United States of America, and defendant Everett T. Carpenter is the Postmaster of the City of North Hollywood, State of California. Defendant Carpenter, in his capacity as Postmaster, is charged with the duties of administering and managing the United States Post Office in and for the said City of North Hollywood, State of California, and is in charge and responsible for the receipt and distribution of materials sent through the United States mails for delivery in and from said City.

III

On or about December 31, 1968, Peter R. Rosenblatt, Judicial Officer of the Post Office Department, executed Order No. 68-103 addressed to defendant Carpenter herein, instructing said defendant Carpenter to return to the sender all mail addressed to plaintiff (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail.

IV

The said Order was made purportedly pursuant to 39 U.S.C. § 4006. Said Section authorizes the Postmaster General, after an administrative hearing, to decide whether mail matter is obscene, and further

authorizes the Postmaster General to impose a mail block against the sender of such matter following the Postmaster General's determination that the matter is obscene. The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed.

V

39 U.S.C. § 4006 fails to meet the essential requirements necessary to restrain speech, set forth by the United States Supreme Court in *Freedman v. Maryland* (1965), 380 U.S. 51.

VI

It is not necessary to consider the remaining contentions of the parties, and we do not pass upon the nature of the materials which were the subject of the administrative hearing.

CONCLUSIONS OF LAW

I

This is a proper case for the convening of a three-judge District Court in accordance with 28 U.S.C. § 2284 to hear plaintiff's application for an injunction to restrain enforcement of 39 U.S.C. § 4006 on the ground that the said statute, on its face and as construed and applied to plaintiff, violates rights guaranteed to the plaintiff by the First, Fifth and Sixth amendments to the United States Constitution.

II

Defendants have imposed a mail block against plaintiff's mail pursuant to 39 U.S.C. § 4006.

III

39 U.S.C. § 4006 is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965), 380 U.S. 51, wherein the United States Supreme Court imposed strict limitations on interference with freedoms of speech and press. 39 U.S.C. § 4006 also conflicts with *Lamont v. Postmaster General* (1965), 381 U.S. 301, because it imposes an unconstitutional burden on the exercise of First Amendment rights.

IV

Plaintiff is entitled to a judgment:

(a) directing the defendants to vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103), executed on or about December 31, 1968; and

(b) directing the defendants to deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference.

V

Plaintiff is entitled to a judgment restraining the defendants, and each of them, their agents, servants, employees and attorneys, and all persons in active concert or participating with them, from instituting against plaintiff any proceedings under 39 U.S.C.

§ 4006, and from enforcing or attempting to enforce the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.
CHARLES H. CARR,
United States District Judge.
MANUEL L. REAL,
United States District Judge.

Approved as to form:

STANLEY FLEISHMAN,
Attorney for Plaintiff.

WM. MATTHEW BYRNE, JR.,
United States Attorney,

By: LARRY L. DIER,
Assistant United States Attorney,
Attorneys for Defendants.

United States District Court for the
Central District of California

No. 69-64-R

TONY RIZZI, DOING BUSINESS AS THE MAIL BOX,
PLAINTIFF

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Judgment

THE COURT, having made its Findings of Fact and Conclusions of Law in the above entitled matter,

IT IS ORDERED, ADJUDGED AND DECREED, that defendants WINTON M. BLOUNT, Postmaster General of the

United States of America; and EVERETT T. CARPENTER, Postmaster of the City of North Hollywood, State of California, and their agents, servants, employees and attorneys, and all persons in active concert or participating with them:

1. Vacate the Order of the Judicial Officer of the Post Office Department (No. 68-103) executed on or about December 31, 1968; and

2. Deliver forthwith to plaintiff all mail addressed to plaintiff now in defendants' possession and to forward all mail addressed to plaintiff, without interference; and

3. Refrain from any proceedings, acts or conduct enforcing the provisions of 39 U.S.C. § 4006 against plaintiff.

DATED: This 1st day of August, 1969.

SHIRLEY M. HUFSTEDLER,
United States Circuit Judge.

CHARLES H. CARR
United States District Judge.

MANUEL L. REAL
United States District Judge.

Approved as to form:

STANLEY FLEISHMAN,
Attorney for Plaintiff.

WM. MATTHEW BYRNE, JR.,
United States Attorney,

By: LARRY DIER,
*Assistant United States Attorney,
Attorneys for Defendants.*

Post Office Department, Washington, D.C.

P.O.D. Docket No. 3/9

IN THE MATTER OF THE COMPLAINT AGAINST THE MAIL
BOX AT P.O. BOX 3192, NORTH HOLLYWOOD, CALI-
FORNIA

Departmental Decision

APPEARANCES:

For the Complainant:

Thomas H. May, Esq.
Jerry P. McKinnon, Esq.
Office of the General Counsel
Post Office Department
Washington, D.C.

For the Respondent:

Stanley Fleishman, Esq.
Peter Marx, Esq.
Robert C. McDaniel, Esq.
1680 Vine Street
Hollywood, California

INTRODUCTION

By complaint filed November 1, 1968, the General Counsel of the Post Office Department (the Complainant) alleged that The Mail Box (the Respondent) is conducting through the mails an enterprise in violation of 39 U.S.C. § 4006. The Complainant concurrently moved for an expedited hearing to be presided over by the Judicial Officer. On November 4, 1968 the Judicial Officer granted the motion for the expedited hearing.

The Respondent's answer, filed November 18, 1968, denied the allegations of the complaint. The Respondent concurrently moved to dismiss the complaint upon the grounds that it failed to state a violation of

§ 4006, that it violates the Respondent's rights under the First and Fifth Amendments to the United States Constitution, and that the seven magazines against which the complaint was brought (hereinafter the "Magazines") are legally indistinguishable from others heretofore found to be protected. The Respondent also requested that the Judicial Officer take judicial [sic] notice of certain of those previous decisions. By reply filed November 22, 1968 the Complainant argued against the Respondent's motion and cross-moved to strike portions of the Respondent's pleadings. On November 26, 1968 the Judicial Officer denied both the Respondent's motion and the Complainant's cross motion, and ruled that Postal Manual § 821.331 (b) deprives him of the authority "to determine the constitutionality of statutes".

The hearing herein was held in Los Angeles, California, on December 3-5, 1968. At the conclusion thereof the Judicial Officer announced that decision would be reserved pending submission of proposed findings of fact and memoranda of law by the parties. Such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Complainant.

Counsel for the Respondent moved that a copy of the transcript be supplied to the Respondent free of charge. The Judicial Officer denied the motion, without prejudice to later renewal, upon the ground that counsel had failed to make any showing in support thereof. Counsel then asked that he be permitted to submit his memorandum without page citations of the record. The request was granted.

The final volume of the transcript was delivered to counsel for the Complainant on December 18, 1968 and the latter's proposed findings of fact, proposed conclusions of law and memorandum of law were filed

on December 23, 1968. A similar document on behalf of the Respondent was filed on December 28, 1968.

THE COMPLAINT

The complaint charges as follows:

"The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges, that under the name set forth in the caption hereof (hereinafter called the Respondent) there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U.S. Code, and in support of that belief alleges as follows:

"(1) That the Respondent is now and for some time heretofore has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles namely certain magazines;

"(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles and things of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

"(3) That attached hereto as Exhibits A through G are true copies of the said circular matter mentioned in the item next above;

"(4) That to persons remitting to Respondent, the sums of money stated in the aforesaid advertisements and solicitations, Respondent sends articles, among them the following magazines which are of an obscene, lewd, lascivious, indecent, filthy or vile nature;

" 'ME'

" 'GIGI'

" 'SUSY'

" 'MATCH'

" 'BUNNY'

" 'GOLDEN GIRLS'

" 'GIRL FRIEND'

"(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy, or vile articles to all those who make appropriate remittances of money therefor.

"WHEREFORE, pursuant to the provisions of Title 39, U.S. Code, Section 4006, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE MAIL BOX, or agents or representatives as such, in accordance with the provisions of said Title 39, U.S. Code, Section 4006."

THE EVIDENCE

Six witnesses appeared on behalf of the Complainant. The thrust of their testimony was as follows:

Donald Schoof, a postal inspector, established jurisdiction and testified with respect to the conduct of the investigation of this case.

Marshall La Cour, head of the photography department at Cypress Junior College, Cypress, California was established as an expert in photography and testified that the photographs in the Magazines displayed poor photographic composition and technique and that they were inartful and entirely without aesthetic quality.

Dr. Melvin Anchel, a psychiatrist, testified that the Magazines lacked any kind of psychological or other value for normal persons of any age, can arrest the normal development of children, can cause "cliff-hanging" adults to regress to an earlier stage of sexual development and "are making neurotics." He described

them as unwholesome and dangerous even to psychologically healthy adults who are more than casually and infrequently exposed to them because of the Magazines' obsessive preoccupation with a distorted view of sex. He found them a "cancer" on society.

E. Richard Barnes, a California State Assemblyman, testified that some of his constituents complained to him about materials which they regarded as obscene, but which he thought were considerably less explicit than the Magazines.

Arthur J. Kates, the head of a large periodical distributing company covering all types of neighborhoods in Los Angeles, stated that his company would not agree to distribute the Magazines and that if it did its business would be destroyed.

Charles Crecelius, a salesman, former elementary school principal and vice chairman of the Los Angeles County Commission on Obscenity and Pornography, was established as a person who has expertise concerning the contemporary community standards in the Los Angeles area and in the United States relative to sexual matters. Mr. Crecelius testified that the Magazines affront contemporary community standards in Los Angeles and the United States relating to the description or representation of sexual matters.

The only witness testifying for the Respondent was *Robert C. McDaniel*, Esq., a practicing lawyer who appeared for the Respondent herein and serves as an associate of Stanley Fleishman, Esq., the Respondent's attorney. Mr. McDaniel was qualified as an expert in constitutional law with particular reference to obscenity. He opined that the Magazines were protected by previous court decisions which had held other magazines which he found comparable to be not obscene.

DISCUSSION

Six of the seven Magazines are composed of exactly 32 printed pages roughly $8\frac{1}{2}$ by 11 inches in size, stapled together in typical magazine form. The 24 pages of the seventh magazine, *Me*, measure about $5\frac{1}{2}$ by $8\frac{1}{2}$ inches. Each of the Magazines is composed largely of photographs of nude or semi-nude women. Such scant written material and advertising as appears in the Magazines relates exclusively to subjects bearing upon physical sex and nudity.

The seven Magazines can be divided into three categories, insofar as their content and format are concerned:

1. *Girl Friend*, *Golden Girls*, *Bunny* and *Match* follow an identical format. The 32 pages (including covers) of each magazine are precisely divided into:

—23 pages of photographs in each of which one nude woman is shown, usually with thighs spread so as to display her genitals. None of the photographs is captioned or specifically linked in subject with the magazines' written material.

— $3\frac{1}{4}$ pages are devoted to a table of contents and advertisements displaying the covers of other publications of a similar nature, touting a "nudist film," Danish "studies in the nude art" and a certain "Studio 'A'" in New York City where one is invited to "photograph female figure models" or skin paint—"try your own designs directly on our female FIGURE MODELS."

— $5\frac{3}{4}$ pages are divided among four articles which are either unsigned or attributed to such presumably pseudonymous authors as "Stanley Sorrel," "Stan Morrel," and "Stanley Ho-

ward," or "Hal Lyons" and "Hal Saint." The articles are given titles such as "Invitation to Rape," "Paradise for Swingers," "Is Wife-swapping for Real?" and "The Nude Imperiled."

The only variation to this rigid formula is found in *Golden Girls*, which substitutes an additional half-page of articles for a half-page of advertising. Each of these four of the Magazines lists one Bradford I. Boone as its editor. An identical statement below the table of contents in *Girl Friend* and *Bunny* describes each magazine as:

a publication seeking to communicate contemporary views relating to sex to prevailing mores. We observe and report on life as it is.

The parallel statement in *Golden Girls* and *Match* proclaims each of those publications as:

a journal equating the nude to contemporary mores. Its goals will be achieved by way of free communication and exemplary photo-artistry establishing the wholesomeness, beauty and charm of the unadorned figure.

2. *Gigi* and *Susy* allot their 32 pages in slightly different proportion.

—28 pages of *Susy* and 28 $\frac{3}{4}$ pages of *Gigi* are given over to captionless photographs of lasciviously posed nude girls. In *Susy* only a total of 5 pages of photographs depict more than one girl per study, but in *Gigi* more than half of the pictures show two or three naked women embracing or otherwise disporting themselves, with the major photographic focus upon their genitals.

—2 pages go to advertisements beckoning the reader to buy more pictures of some of the girls purportedly shown in the two magazines, an "unretouched female indoor nudist film" and

still photo-sets, and two magazines, one of which is called *Lesbianism—A Sexual Study* ("100 intimate fotos [sic] of lesbians—20 case histories") and the other *Sadism and Masochism* ("60 intimate fotos—20 models" and a thorough study on "spanking and the Lesbian" and "homosexual spanking").

—*Susy* devotes its remaining 2 pages to an unsigned story entitled "The Conversion" which purports to detail, in the first-person, the seduction into lesbianism of a girl increasingly dissatisfied with her intensely active heterosexual life. *Gigi* spares about 1¼ pages to a fictional story about a girl's successful utilization of her body on the road to movie stardom.

Neither magazine contains a printed word other than in its single story, the two pages of advertising and the front cover.

3. The only printed words appearing in *Me*, the seventh magazine, are on its cover. The rest of the publication is given over entirely to the familiar gallery of uncaptioned photographs of one or several naked women in the usual noisome poses.

The women depicted in each of the Magazines' photographs are almost always positioned in such a fashion as to display their genitals prominently and in clinical detail. The models are typically portrayed with thighs widely parted or in some other forced and unnatural position which serves to spread or otherwise feature their organ and focus attention upon it. When they are shown partially clothed the clothes are so arranged as to further stress the photographic focus on the sexual organ.

Printed in ⅛ to ¼ inch type at the bottom of the front cover of each of the Magazines there appear the words "Adults Only" or, in the cases of *Susy* and *Gigi*, "For Adults Only." The order blanks attached to the

Respondent's circulars bear a statement that the remitter must be at least 21 years old. However these outward manifestations of Respondent's concern are not part of a serious effort to deter indiscriminate circulation of the Magazines to minors. On the contrary, they serve both as additional enticement and as a sort of verbal screen behind which the Respondent conducts its business in a fashion which negatives such concern and which, in fact, almost precludes further efforts to ascertain a remitter's age.

Donald Schoof, the postal inspector, in establishing jurisdiction, testified to the complaint of postal patrons against mail receipt of the Respondent's pandering solicitations and his own use of the mails in sending for the Magazines (34 ff.).* Mr. Schoof's testimony revealed that he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return. He could quite easily have been well under 21 years of age for all the Respondent knew or, one may suppose, cared.

In *Roth v. United States* (1956) 354 U.S. 476 and in several decisions that followed the United States Supreme Court defined obscenity in these terms [*Memours v. Massachusetts* (1965) 383 U.S. 413, at p. 418]:

* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

*References, unless otherwise noted, are to pages of the typed transcript of the hearing.

The evidence adduced by the Complainant established that the dominant theme of the material taken as a whole appeals to the prurient interest [*Roth v. United States*, *supra*, at p. 489; *Memoirs v. Massachusetts*, *supra*, at pp. 418-19; *Jacobellis v. Ohio* (1963) 378 U.S. 184, 191; *Manual Enterprises v. Day* (1961) 370 U.S. 478, 486-8].

The witness Dr. Anchell did not know the meaning of the word "prurient" (134-5, 223), but he did describe the Magazines in terms which are used by the Webster Dictionary to define "prurient"—namely, "1. having lustful ideas or desires. 2. lustful; lascivious; lewd: * * *." Thus, the doctor found the Magazines, among other things, "lewd," "lascivious" and "filth" and stated that their effect would be to stimulate the reader sexually and push him in the direction of perverted forms of sexual expression—"It conjures up earlier developmental stages, times which the visual gave this individual or the exhibitionist, voyeuristic pleasures gave this individual more satisfaction than the normal mature sexuality, and so he is brought back very strongly with such stimuli." (151, 136-152, 161-6, 181-2, 223-5, 248-9.)

Mr. La Cour, the photographer, testified that in almost every one of the photographs in the Magazines the pubic area of the model shown has been "fore-shortened"—that is, a photographic technique has been used to bring the model's pubic area too close to the camera for correct perception in order to "force" the observers' attention upon it (100-1).

Any lingering doubt about the Respondent's intent to appeal to the prurient interest and its success in so doing is dissipated by an examination of the circulars [Exhibits A, B, F2(1), N-1(b)] by which the Respondent advertised the Magazines and solicited orders for them [see *Ginzburg v. United States* (1965)

383 U.S. 463, 470-4 and *United States v. Rebhuhn* (C.A. 2, 1940) 109 F.(2d) 512, 515, concerning role of advertising]. Each of the Magazines was advertised in flyers which appeal to the full range of human sexual deviations and perversions. Thus we find an issue of *Me* advertised under the heading "Female Nudist Specials" among photos of the covers of 24 other such publications each of which shows a nude or semi-nude girl in a pose typical of those in the Magazines themselves. The same circular advertises, in the same manner, 25 "Spanking, Bondage & Flag Mags.," "20 New Paperbacks * * * bound in full color covers * * * banned from the U.S.A. until recently," and 18 "Sexual Study Books" including *Sadism and Masochism*, *Female Masturbation*, *New Breast Fetishism* and *A Study of the Peeping Tom* * * * *Plus 60 Revealing Photos of Women Caught Unaware of the Fact that they were being Photographed NUDE.*

Suffice it to say that the other advertising adduced at the hearing, by which the Respondent solicited orders, is characterized by the same unrelieved, leering sordidness. For accuracy, none of the advertising can surpass Exhibit F2(1) which, in touting *Girl Friend*, *Bunny*, *Golden Girls* and *Match*, promises:

Unusual photographic techniques, exploring every nook and cranny of the female form. Additional emphasis is placed on the *inner* beauty of our models, as the camera explores bodily regions never attempted before. Close attention to detail * * *.

If the dominant theme of the material taken as a whole—largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera—cannot be taken as an appeal to the prurient interest then, indeed, the word "pru-

rient" and those other words by which it is defined have ceased to have any meaning.

The second of the elements of obscenity requires an inquiry as to whether the Magazines are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters [*Roth v. United States*, *supra*, at p. 489; *Memoirs v. Massachusetts*, *supra*, at pp. 418-19; *Jacobellis v. Ohio*, *supra*, at pp. 191-5; *Manual Enterprises v. Day*, *supra*, at pp. 486-7].

Exhaustive examination on the point established the witness Crecelius' unusual interest and activity in the area of pornography and obscenity. It was clear that he approached the problem from his own personal standpoint and lacked a sophisticated background in the subject. However it became equally evident that his sustained interest, voluntary work and official position in his home community of Los Angeles, and wide and continuous travel and inquiry on the subject within the United States, qualified him to deliver an opinion regarding contemporary standards in Los Angeles and the United States relating to the description or representation of sexual matters. In his opinion the Magazines fell below such standards.

Mr. Barnes, the assemblyman, testified that Californians "repeatedly" (273) complained to him about materials considerably less explicit than the Magazines.

Mr. Kates, the owner and chief executive officer of Sunset News Company, a large periodical distributor in the Los Angeles metropolitan area, testified that Sunset distributes, *inter alia*, magazines such as *Playboy*, *True* and *Cavalier*, which depict women in the nude or semi-nude. However he said, "I can make the

unqualified statement if the Sunset News Company distributed any one of the periodicals that I have examined [the Magazines] to our dealers, they would not only not be accepted, but it would result in the destruction of Sunset News Company" (290-1). He further declared that "The distribution of these periodicals in my opinion through any legitimate trade channels would result in the destruction of those channels. They are not acceptable at any price" (298).

I find that the Magazines considerably exceed the customary limits of candor in the United States and affront contemporary community standards relating to the description or representation of sexual matters. They are therefore patently offensive.

Even though the Magazines' patent offensiveness and their appeal to the prurient interest have been ascertained they cannot be found obscene unless it can also be determined that the material they contain is without "the slightest redeeming social importance" [*Roth v. United States, supra*, at p. 484; *Memoirs v. Massachusetts, supra*, at pp. 418-19; *Jacobellis v. Ohio, supra*, at p. 191].

Dr. Anchell's persuasive and uncontroverted testimony established that, far from having any beneficial effect upon readers young and adult, emotionally stable and unstable, perverted and "normal," this material could only have a distinctly damaging impact if it had any at all. The best that could be hoped for was that it would have none.

From the witness La Cour we learned that the pictures, which occupy anywhere from a minimum of about eighty percent to a maximum of one-hundred percent of the Magazines' space, are bad photography and lacking in artistic or aesthetic quality.

Me, of course, lacks written material, and only 1¼ pages in *Gigi*, 2 pages in *Susy*, 5¾ pages in *Girl Friend*, *Bunny* and *Match*, and 6¼ pages in *Golden Girls* are given over to some kind of writing. Each of them, with the exception of the fiction in *Gigi* and *Susy*, is devoted to some ostensibly serious topic on the subject of sex or nudity. None of them makes any attempt to contribute to the sum of human knowledge, seriously promote a social cause, provide useful information, or even entertain, except perhaps by catering to the presumed needs of particularly obsessive readers. The same can be said of *Gigi's* and *Susy's* fiction.

The pro-forma assertions of serious intent hoisted like a talisman near the mastheads of *Girl Friend*, *Golden Girls*, *Bunny* and *Match* and quoted on page 8 hereof, proclaim a serious and socially redeeming value which those and the other Magazines fail to deliver. Needless to say the Respondent's advertising heralds the very reverse of the serious social purposes which the Magazines proclaim they serve. The mere recitation of a formula or the insertion of a few stock paragraphs or pages of written filler material will not serve to lend redeeming social importance to a publication which would otherwise lack it.

I find the Magazines lacking "even the slightest redeeming social importance."

The Respondent's case was based entirely upon the contention that various courts of law and the Post Office Department itself had passed upon other publications represented as being of a similar nature and had found them to be not obscene. In other words, the Respondent offered no evidence in rebuttal of the Complainant's case but, rather, argued the law.

The precedents presented and the samples of the materials on which they turned are as follows (in the order offered):

<i>United States v. Three Packages</i> , Civil No. 68-25-F, U.S.D.C., Cent. Dist. Cal. (Ferguson, J.), findings of fact and conclusions of law, Feb. 20, 1968 (Exhibits R-1).	Exhibits 3-9.
<i>United States v. 80 Cartons</i> , Civil No. 68-480-IH, U.S.D.C., Cent. Dist. Cal. (Hill, J.), findings of fact and conclusions of law, April 30, 1968 (Exhibit R-2).	Exhibits 6-10.
Magazines which enjoy second-class mailing privileges granted by the Post Office Department.	Exhibits 13-20.
<i>People v. Bonanza Printing Co., Inc., et al.</i> , No. 317074 Los Angeles Municipal Court (Ackerman, J.), Nov. 8, 1968.	Exhibits 21-22.
<i>Felton v. Pensacola</i> (1968) 390 U.S. 340.	Exhibits 23-27.
<i>United States v. Six Parcels of Photographs</i> , Civil No. 66-1129-PH, U.S.D.C., Cent. Dist. Cal. (Hall, J.), order granting motion for Summary Judgment and Judgment, Dec. 3, 1968 (Exhibit R-28).	Exhibits 28 a-e.

In rebuttal, the Complainant offered the decision, findings of fact, conclusions of law and order of dismissal of the U.S. District Court for the Central District of California (Hauk, J.) in *Marvin Miller, et al. v. Thomas Reddin, et al.*, No. 68-712-AAH, of November 18, 1968 (Exhibit O) and *Female Photographs* (Exhibit O-1), one of the publications passed on in that case. Subsequent to the hearing herein another judge of the same court (Real, J.) found the same publication not obscene in a criminal trial of that issue (*United States v. Marvin Miller*, Nos. 1842, 2166, 2396).

I find that none of these decisions provide me with a binding precedent. In *Felton v. Pensacola, supra*, the Supreme Court, citing *Redrup v. New York* (1967) 386 U.S. 767, held distribution of the materials at issue to be protected by the First and Fourteenth Amendments. It is obvious at a glance that the materials which the Court there ruled on differ from the Magazines here at issue in several particulars touching upon each of the three elements by which the Supreme Court defined obscenity in *Roth* and the decisions that followed.

Without getting into matters of comparison, I find that the value of the three California district court decisions offered by the Respondent as precedents in defining the parameters of permissible expression, is nullified by the same court's contrary holding on the book *Female Photographs* (Exhibit O-1) in *Miller v. Reddin, supra*, which, in turn, is further confused by the holding in *United States v. Marvin Miller, supra*. Nor will I accept a decision of the Los Angeles Municipal Court as a binding interpretation of obscenity under the federal statute. Likewise, the mere granting of second-class entry to certain publications establishes no formal or informal precedent which is binding upon the Judicial Officer in rendering a departmental decision. The regulations of the Department provide that such action is actually subject to the Judicial Officer's review on appeal by a rejected applicant. It might also be noted that on only one occasion since the Supreme Court raised a fundamental question as to the Department's administrative jurisdiction in 1961 in *Manual Enterprises v. Day, supra*, has the Department sought to deny second-class entry to a publication on grounds of obscenity.

For some years now the basic questions relating to obscenity have given rise to an intense public debate: Is the concept of obscenity worthy of retention; do concededly obscene materials indeed have an unwholesome or unhealthy effect upon society or any of its individual members; and do any public agencies therefore have the right to inhibit the free circulation of concededly obscene materials on that ground? The ultimate answers to these questions must await, among other things, greater empirical knowledge of the impact of erotica on society. But for the present the appropriate authorities in our society, the Congress and the United States Supreme Court, have answered

all three questions in the affirmative. The Congress has also long imposed upon this Department the right and duty of exercising a certain limited scrutiny over materials distributed through the mails, and the Supreme Court has not specifically relieved us of that function.

Since the concept of obscenity as an offense to society's standards and best interests yet remains in our system of law, it would be logically inconsistent to deprive it of any meaningful content. No fair-minded observer could possibly conclude that these Magazines with their page upon endless page of pictures of naked women with spread thighs, are designed for any purpose other than as an appeal to the prurient interest; and one would have to be prepared to conclude that the prurient appeal is of itself socially important in order to discern the element of redeeming social value in the Magazines. While that portion of the Complainant's presentation specifically directed to the issue of offense to contemporary community standards was not particularly impressive, the evidence as a whole amply established the fact that Americans as a whole are not yet prepared to grant such grossly commercial, artistically worthless, socially unexpressive and otherwise valueless erotica an accepted place in the panoply of diverse utterances which flourish in a free society.

Hence until such time as the concept of obscenity has been abandoned for good and all or so drastically restricted as to apply, for example, only to depictions of sex acts—as the California Supreme Court is recently reported to have suggested—or until this Department is conclusively stripped of its legal duties in regard to obscenity, there can be no doubt that prevailing legal and cultural norms require the findings and conclusions contained herein.

In accordance with the foregoing decision I now make my formal Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. The Respondent has deposited in the mails advertisements or circular matter giving information as to where, how or from whom the magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 could be obtained.

2. The Respondent sent the aforesaid magazines to persons remitting to the Respondent the sums of money stated in the aforesaid advertisements or circular matter.

3. The dominant theme and predominant appeal of each of the aforesaid magazines, taken as a whole, is to the prurient interest in sex. They are patently offensive to contemporary community standards relating to the description or representation of sexual matters and are utterly without redeeming social importance.

4. The following Conclusions of Law, insofar as they may be deemed Findings of Fact, are so found to be true in all respects. From the foregoing facts I conclude:

CONCLUSIONS OF LAW

1. The magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 are obscene, and therefore do not constitute constitutionally protected expression.

2. "The Mail Box" is a person who is obtaining or attempting to obtain remittances of money through the mail for the seven aforesaid magazines which are

obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

3. "The Mail Box" is a person who is depositing, or causing to be deposited, in the United States Mail information as to where, how and from whom the addressee may obtain magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

4. The activities set forth in conclusions 2 and 3 constitute a violation of the provisions of 39 U.S.C. § 4006 governing the use of the United States Mails for the advertising of, or receipt of remittances for unlawful matter.

5. Any Conclusions of Law contained in the Findings of Fact are incorporated herein by reference.

CONCLUSION

For all of the foregoing reasons I find that the Respondent's activities complained of constitute an enterprise in violation of 39 U.S.C. § 4006. An order to the appropriate postmasters pursuant to the provisions of 39 U.S.C. § 4006 will, accordingly, issue forthwith.

PETER R. ROSENBLATT,
Judicial Officer.

MEMORANDUM—U.S. POST OFFICE DEPARTMENT
DECEMBER 31, 1968.

Subject: Transmittal of unlawful order.

From: Judicial Officer, Post Office Department, Washington, D.C. 20260.

To: Postmaster, North Hollywood, California.

In reply refer to: P.O.D. Docket 3/9.

I enclose herewith a copy of Order No. 68-103, dated December 31, 1968, forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

This order does *not* cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail

containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address.

PETER R. ROSENBLATT,
Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, December 31, 1968.

Order No. 68-103.

To the Postmaster at North Hollywood, California
91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P.O. Box 3192
at

North Hollywood, California 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said

evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86-676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respondent. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to the said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmasters at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to

the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

P.O.D. Docket No. 3/9, G.C. 4370.

PETER R. ROSENBLATT,
Judicial Officer.

APPENDIX B

United States District Court for the Northern District
of Georgia—Atlanta Division

Civil Action No. 12812

UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL

v.

THE BOOK BIN

Before MORGAN, Circuit Judge, and EDENFIELD and
HOOPER, District Judges

EDENFIELD, *District Judge*: The issue before this three-judge court is the constitutionality of 39 U.S.C. §§ 4006, 4007, under which the Postmaster General acts to curb the flow of allegedly obscene materials through the mails.

On or about June 10, 1969, a complaint was served on the defendant by a representative of the Postmaster General under 39 U.S.C. § 4006, charging that the magazine "Models of France," distributed by defendant, was obscene. An order granting an expedited proceeding was attached, setting a hearing for July 8, 1969, which has since been postponed indefinitely. On June 13, 1969, the United States notified defendant that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. § 4007, in the United States District Court for the Northern District of Georgia. Under § 4007, a court, upon a showing of probable cause that the

obscenity statute has been violated, may direct the detention of all of a defendant's incoming mail, pending the conclusion of the § 4006 proceedings and any appeal therefrom. By way of answer and counterclaim, defendant has challenged the statutory scheme employed under §§ 4006, 4007. A three-judge court was convened to consider this constitutional challenge. At oral hearing, the Government recognized the desirability of an immediate determination of the constitutional questions.

Under § 4006:

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances or money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representatives, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.

Thus, upon an administrative finding by the Postmaster General that the defendant is sending obscene material through the mail, all of his incoming mail may be marked unlawful and returned to the senders, and the Postmaster General may forbid payment

of any money orders or postal notes drawn to his name and likewise return them to the senders.

However, prior to 1956, the Postmaster had no authority to prevent the delivery of mail to the suspected offender during the pendency of the statutory [§ 4006] proceedings. "As a result, the person against whom such a mail block was finally imposed had frequently reaped the harvest from his illegal activity and, mail addressed to one location having been blocked, simply launched a similar activity at a new address." Senate Report No. 1818, U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246.

To remedy this situation, the Postmaster General in 1956 received congressional authority to enter an order permitting the temporary, 20-day, impounding of a defendant's incoming mail pending culmination of statutory proceedings and appeal, if necessary to the enforcement of § 4006. The United States District Court could extend the period of detention upon the petition of the Postmaster General. Because of the hardship imposed by the 20-day limitation, the Post Office Department requested—and a House of Representatives bill granted—a 45-day period of detention of a defendant's incoming mail, after which an extension could be obtained by a United States District Court order. However, in 1960, the Congress adopted a Senate measure which removed the arbitrary time limit on detention pending § 4006 action, by substituting a judicial injunction permitting detention throughout the course of the statutory proceedings under § 4006. The 1960 bill, now § 4007, was designed to insure "court supervision of the exercise of the power to detain mail" coming to the defendant. *See*, U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3246; *Manual Enterprises v. Day*, 370 U.S.

478, 512-519 (1962) (Brennan, J., concurring). Section 4007 provides, in pertinent part:

(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

Section 4007 thus complements § 4006, *see*, 39 C.F.R. § 952.6, and the two sections should be interpreted together. For reasons set out below, we find this statutory scheme violative of the First Amendment to the United States Constitution.

First, under § 4007, the United States can obtain a court order detaining *all* of the incoming mail to the defendant. The breadth of this section goes far beyond merely maintaining the status quo. While the defendant may secure delivery of mail which is clearly "not connected with the alleged unlawful activity", the statute imposes an affirmative obligation upon him to examine the mail and demonstrate its non-connection. This obligation to come from under an overly broad

statutory imposition puts an unconstitutional restraint on the defendant's First Amendment rights. Thus, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Court considered a procedure under which the Postmaster General could withhold communist political propaganda sent to an addressee—as well as similar material sent in the future, if the addressee did not return a card to the post office within 20 days of its receipt. In order to receive the mail, the addressee had to request in writing on the card that it be delivered. This procedure was struck down because, as in the instant action, “[t]he addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect. * * *” *Lamont v. Postmaster General*, supra, at 307. Justice Brennan, in a concurrence, recognized that the consequence of inaction by the addressee was not only nondelivery of the material in question, but “a denial of access to like publications which he may desire to receive.” 381 U.S. at 309. Like the procedures considered in *Lamont*, § 4007 suffers both from a fatal overbreadth of reach, in detaining all incoming mail, and from imposition of an unwarranted affirmative obligation on the defendant to remove mail unrelated to the alleged obscenity in question. It disrupts, rather than maintains, the status quo, pending post office action in § 4006.

Second, the procedures established in §§ 4006, 4007, do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman v. Maryland*, 380 U.S. 51 (1965) (per Brennan, J.), establishes the litmus tests by which we should be guided in cases such as this. There the Supreme Court recognized, as it had before, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), that prior submission of material to agency censorship

action was not per se unconstitutional under proper safeguards. To avoid First Amendment problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under §§ 4006, 4007, fall short of meeting these rigid requirements.

Under these sections, no restraint is generally imposed under § 4006 until a § 4007 judicial order is obtained. However, under § 4007, the court must issue a restraining order merely upon a showing of "probable cause." This judicial determination of probable cause is not binding in any way on the administrative decision in § 4006. Section 4007 specifically provides, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings." Indeed, this quoted passage was inserted at the behest of the Postmaster General to "guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter, Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U.S. Code Cong. and Admin. News, 86th Cong., 2d S., 1960, at 3249. If a United States District Court fails to find probable cause, as it often will, the Postmaster General could still find a violation of § 4006 and impose the restrictions pursuant to that section, without any prior judicial hearing on obscenity. Moreover, it is doubtful if the limited judicial finding implicit in the grant of a § 4007 finding insulates the procedure from con-

stitutional infirmity, since the court issues its order merely on a finding of probable cause, not an actual determination of obscenity. Thus, the statutory scheme effectively operates as a prior restraint.

While prior restraints are not per se indefensible they bear a heavy presumption of invalidity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. President and Commissioners of Prisons and Anne*, 393 U.S. 175 (1968). This presumptive invalidity is not overcome in the instant case by carefully drawn safeguards. *Contrast, Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The administrative procedures established by regulation under § 4006, 39 C.F.R. §§ 952.1-952.33, do not provide the procedural safeguards envisioned by *Freedman* and succeeding Supreme Court cases. Thus, in *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968), a 50- to 57-day delay between initiation of administrative procedure and institution of judicial proceedings in a censorship action was found to be violative of First Amendment rights. In *Freedman* itself, a delay of four months in securing initial judicial determination and six months in obtaining final appellate review was condemned, 380 U.S. at 55. Compare, *United States v. One Cartoon Positive Motion Picture Film*, 247 F.Supp. 45 (S.D.N.Y. 1965), *rev'd. on other grounds*, 367 F.2d 889 (2d Cir. 1966). Under the instant procedures, hearing date under § 4006 must be provided, "[w]hen ever practicable * * * within 30 days of the date of the notice" of the hearing. 39 C.F.R. § 952.7. In the instant case a hearing was set four weeks after service of the complaint against the defendant, although it has since been postponed. After an administrative hearing, the Post Office hearing examiner is required only to issue a report with "all due speed." 39 C.F.R. § 952.24. If the hearing examiner finds against the

defendant, an appeal must be taken, to exhaust administrative remedies, within 15 days of the examiner's decision. 39 C.F.R. § 952.25. There is no deadline for the decision on administrative appeal. Moreover, 39 C.F.R. § 952.27 provides for the filing of a motion for reconsideration of a final Departmental decision.

During this protracted procedure, all of the defendant's mail may be detained if a § 4007 order has been obtained—with only a judicial decision of probable cause of obscenity. Even if the court failed to find probable cause and did not issue a § 4007 order, the defendant would be dissuaded from soliciting orders and distributing the challenged material, because of the possibility that remittances for the material would be withheld once § 4006 administrative action was complete. This chilling inhibition on First Amendment rights during the pendency of lengthy administrative procedures cannot withstand constitutional assault. An inhibition as well as a prohibition are equally denied to the Government in the First Amendment area. *Lamont v. Postmaster General*, *supra*, at 309 (Brennan, J., concurring); *see, also, Boyd v. United States*, 116 U.S. 616, 635 (1886).

Moreover, if the final administrative decision is against him, the defendant, under the Administrative Procedure Act, must institute judicial review and has the burden of demonstrating that no substantial evidence exists to support the Postmaster's finding of obscenity. This is too great an imposition of defendant's First Amendment rights. *See, especially, Freedman v. Maryland*, *supra*, 380 U.S. at 59–60, where such a burden was found unacceptable. Compare *United States v. One Carton*, *supra*, at 458, where the court upheld the constitutionality of § 305 of the Tariff Act, because, in part, the defendant there did not bear the burden of securing a judicial determination of obscen-

ity; rather the burden was thrust on the Government. See, also, *United States v. Magazine Entitled "Hellenic Sun"*, 253 F. Supp. 498 (D. Md. 1966), *aff'd*, 373 F. 2d 633 (4th Cir. 1967). The application of the Postmaster General here for an injunction under § 4007 does not correct this constitutional flaw in the instant statutory network. As noted, § 4007 does not permit a full judicial finding on obscenity, but restricts a court to a finding of probable cause. Moreover, even if a court found the material in question non-obscene and failed to issue a § 4007 order, the Postmaster would not be barred from proceeding under § 4006, with the attendant restraints discussed.

Thus, in short, action under §§ 4006-7 may be taken which goes beyond preservation of the status quo, which fails to assure a prompt administrative decision, and which thrusts the requirement of a judicial determination on the defendant.

Third, contrary to the Government's central argument, the statutes impose a direct restraint on the distribution of the allegedly obscene materials. We reject the Government's argument that its actions are aimed only at remittances, not at distribution of obscene materials. See, *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting); *Standard v. Olesen*, 74 S. Ct. 768, 771 (1954) (Douglas, J., as Circuit Judge). Any action aimed at remittances received for material will have a direct restraint on distribution of the material itself. A defendant is likely to restrict or end distribution of material as to which a § 4007 order has been obtained, or as to which a § 4006 proceeding is pending. The United States may not accomplish by indirection, through action against remittances, what it cannot do directly. The United States urges that the predecessor to § 4006 has been upheld against constitutional

assault by the courts. However, the decisions cited either go off on other grounds or give little if any consideration to the constitutional issue raised. Thus, in *Tourlanes Publishing Co. v. Summerfield*, 231 F. 2d 773 (D.C.A. 1956), cert. denied, 352 U.S. 912, cited by the United States, the court specifically stated they were not reaching the "difficult constitutional issues raised" by the cross-appeal, concerning the Postmaster General's refusal to deliver all of Tourlanes' mail. 231 F. 2d at 775. *Glanzman v. Finkle*, 150 F. Supp. 823 (E.D.N.Y. 1957), assumes the constitutionality of the predecessor to § 4006, citing *Summerfield v. Sunshine Book Co.*, 211 F. 2d 42 (D.C.A. 1954), cert. denied, 349 U.S. 921, yet the latter case, also cited by the Government, did not fully consider the constitutional questions, 221 F. 2d at 48, but concentrated on the breadth of the Postmaster's order. Moreover, these preceded *Freedman v. Maryland*, *supra*, and many of the other cases imposing strict procedural requirements on Government censorship. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968); *Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968); *Metzger v. Percy*, 393 F. 2d 202 (7th Cir. 1968); *Tyrone, Inc. v. Wilkinson*, 294 F. Supp. 1330 (E.D. Va. 1969); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968). The most recent court to consider § 4006, a three-judge court in *Rizzi v. Blount*, No. 69-64-R, June 10, 1969, C.D. Cal. (per curiam), held it unconstitutional on its face as contrary to *Freedman*, *supra*, and *Lamont*, *supra*. Our discussion here, concerning §§ 4006, 4007, supports that court's conclusion.

We understand the concern of Congress and the Post Office to restrict the flow of obscenity through

the mails. It may perhaps be true that criminal punishment for mailing obscenity under 18 U.S.C. § 1461 is an inadequate weapon in the Postmaster General's arsenal. However, it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007, are invoked.

In the instant case, the defendant can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by his own initiative. During the interim, the prolonged threat of an adverse administration [sic] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of defendant's First Amendment rights—all without a *final* judicial determination of obscenity. Judicial participation in the finding of obscenity under the statutory scheme here is either too little (§ 4007) or too late (§ 4006).

The statutory scheme is unconstitutional and we therefore GRANT defendant's motion to dismiss and its counterclaim.

This 8th day of September, 1969.

LEWIS R. MORGAN,
United States Circuit Judge.
NEWELL EDENFIELD,
United States District Judge.

FRANK A. HOOPER,
United States Senior District Judge.

United States District Court for the Northern District of Georgia—Atlanta Division

Civil Action File No. 12812

UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL

v.

THE BOOK BIN

Judgment

This action came on for hearing before the Court, Honorable Lewis R. Morgan, U.S. Circuit Judge, and Honorable Newell Edenfield and Honorable Frank A. Hooper, United States District Judges, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendant's motion to dismiss and its counterclaim. It is Ordered and Adjudged that judgment is hereby entered for the defendant, The Book Bin, and against plaintiffs, United States of America and The Postmaster General; and that the defendant recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 16th day of October, 1969.

CLAUDE L. GOZA,
Clerk of Court.

By: RUTH M. STILWELL,
Deputy Clerk.

APPENDIX C

39 U.S.C. 4006 provides:

§ 4006. "UNLAWFUL" MATTER.

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes. (Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 655.)

39 U.S.C. 4007 provides:

§ 4007. DETENTION OF MAIL FOR TEMPORARY PERIODS.

(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Post-

master General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers. (Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 655; Pub. L. 87-646, § 10, Sept. 7, 1962, 76 Stat. 444.)

Part 952 of 39 C.F.R. provides:

**RULES OF PRACTICE IN PROCEEDINGS RELATIVE
TO FRAUD, LOTTERY AND OBSCENITY ORDERS
UNDER 39 U.S.C. 4003, 4005, AND 4006**

§ 952.1 Authority for rules.

These rules of practice are issued by the Judicial Officer of the Post Office Department (see § 952.26) pursuant to authority delegated by the Postmaster General.

§ 952.2 Scope of rules.

These rules of practice shall be applicable in all formal proceedings before the Post Office Department initiated under or pertaining to 39 U.S.C. 4003, 4005, and 4006, including such cases instituted under prior rules of practice pertaining to these or predecessor statutes, unless timely shown to be prejudicial to the respondent.

§ 952.3 Informal dispositions.

These rules do not preclude the disposition of any matter by agreement between the parties either before or after the filing of a complaint when time, the nature of the proceeding, and the public interest permit.

§ 952.4 Office, business hours.

The offices of the officials mentioned in these rules are located at the Post Office Department, 12th and Pennsylvania Avenue NW., Washington 25, D.C., and are open Monday through Friday from 8:45 a.m. to 5:15 p.m.

§ 952.5 Complaints.

When the General Counsel of the Post Office Department or his designated representative believes that a person (1 U.S.C. 1) is using the mails in a manner requiring formal administrative action under 39 U.S.C. 4005 or 4006, he shall prepare and file with the Docket Clerk a complaint which names the person involved; states the legal authority and jurisdiction under which the proceeding is initiated; states the facts in a manner sufficient to enable the person named therein to make answer thereto; and recommends the issuance of an appropriate order. The person so named in the complaint shall be known as the respondent.

§ 952.6 Interim impounding.

In preparation for or during the pendency of a proceeding initiated under 39 U.S.C. 4005 or 4006, mail addressed to a respondent may be impounded upon obtaining an appropriate order from a United States District Court, as provided in 39 U.S.C. 4007, as amended by 74 Stat. 553 (Public Law 86-673).

§ 952.7 Notice of hearing.

When a complaint is filed the Docket Clerk shall issue a notice of hearing stating the time and place of the hearing and the date for filing an answer which shall not exceed 15 days from

the service of the complaint, and a reference to the effect of failure to file an answer or appear at the hearing. (See §§ 952.10 and 952.11) Whenever practicable, the hearing date shall be within 30 days of the date of the notice.

§ 952.8 Service.

(a) The Docket Clerk shall cause a notice of hearing and a copy of the complaint to be transmitted to the postmaster at any office of address of the respondent or to the inspector in charge of any division in which the respondent is doing business, which shall be delivered to the respondent or his agent by said postmaster or a supervisory employee of his post office or a postal inspector. A receipt acknowledging delivery of the notice shall be secured from the respondent or his agent and forwarded to the Docket Clerk, Room 3350, Post Office Department, Washington 25, D.C., to become a part of the official record.

(b) In the event no person can be found to accept service of the notice of hearing and complaint pursuant to paragraph (a) of this section, the notice may be delivered in the usual manner as other mail addressed to the respondent. A statement, showing the time and place of delivery, signed by the postal employee who delivered the notice of hearing shall be forwarded to the Docket Clerk and constitute evidence of service.

§ 952.9 Filing documents for the record.

(a) Each party shall file with the Docket Clerk pleadings, motions, orders and other documents for the record. The Docket Clerk shall cause copies to be delivered promptly to other parties to the proceeding and to the presiding officer.

(b) The parties shall submit four copies of all documents unless otherwise ordered by the presiding officer. One copy shall be signed as the original.

(c) Documents shall be dated and state the docket number and title of the proceeding. Any pleading or other document required by order of the presiding officer to be filed by a specified date shall be delivered to the Docket Clerk on or before such date. The date of filing shall be entered thereon by the Docket Clerk.

§ 952.10 Answer.

(a) The answer shall contain a concise statement admitting, denying, or explaining each of the allegations set forth in the complaint.

(b) Any facts alleged in the complaint which are not denied or are expressly admitted in the answer may be considered as proved, and no further evidence regarding these facts need be adduced at the hearing.

(c) The answer shall be signed personally by an individual respondent, or in the case of a partnership by one of the partners, or, in the case of a corporation or association, by an officer thereof.

(d) The answer shall set forth the respondent's address and the name and address of his attorney.

(e) The answer shall affirmatively state whether the respondent will appear in person or by counsel at the hearing.

(f) If the respondent does not desire to appear at the hearing in person or by counsel he may request that the matter be submitted for determination pursuant to paragraph (b) of § 952.11.

§ 952.11 Default.

(a) If the respondent fails to file an answer within the time specified in the notice of hearing, he shall be deemed in default, and to have waived hearing and further procedural steps. The Judicial Officer shall thereafter issue an order without further notice to the respondent.

(b) If the respondent files an answer but fails to appear at the hearing, the presiding

officer shall receive complainant's evidence and render an initial decision.

§ 952.12 Amendment of pleadings.

(a) Amendments proposed prior to the hearing shall be filed with the Docket Clerk. Amendments proposed thereafter shall be filed with the presiding officer.

(b) By consent of the parties a pleading may be amended at any time. Also, a party may move to amend a pleading at any time prior to the close of the hearing and, provided that the amendment is reasonably within the scope of the proceeding initiated by the complaint, the presiding officer shall make such ruling on the motion as he deems to be fair and equitable to the parties.

(c) When issues not raised by the pleadings but reasonably within the scope of the proceedings initiated by the complaint are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments as may be necessary to make the pleadings conform to the evidence and to raise such issues shall be allowed at any time upon the motion of any party.

(d) If a party objects to the introduction of evidence at the hearing on the ground that it is not within the issues made by the pleadings, but fails to satisfy the presiding officer that an amendment of the pleadings would prejudice him on the merits, the presiding officer may allow the pleadings to be amended and may grant a continuance to enable the objecting party to rebut the evidence presented.

(e) The presiding officer may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented and which are relevant to any of the issues involved.

§ 952.13 Continuances and extensions.

Continuances and extensions will not be granted by the presiding officer except for good cause shown.

§ 952.14 Hearings.

Hearings are held in Room 5241, Post Office Department, Washington 25, D.C., or other locations designated by the presiding officer.

§ 952.15 Change of place of hearings.

Not later than the date fixed for the filing of the answer, a party may file a request that a hearing be held to receive evidence in his behalf at a place other than that designated for hearing in the notice. He shall support his request with a statement outlining:

- (a) The evidence to be offered in such place;
- (b) The names and addresses of the witnesses who will testify;
- (c) The reasons why such evidence cannot be produced at Washington, D.C.

The presiding officer shall give consideration to the convenience and necessity of the parties and the relevancy of the evidence to be offered.

§ 952.16 Appearances.

(a) A respondent may appear and be heard in person or by attorney.

(b) An attorney may practice before the Department in accordance with applicable rules issued by the Judicial Officer. See Part 951 of this chapter.

(c) When a respondent is represented by an attorney, all pleadings and other papers subsequent to the complaint shall be mailed to the attorney.

(d) A respondent must promptly file a notice of change of attorney.

§ 952.17 Presiding officers.

(a) The presiding officer at any hearing shall be a Hearing Examiner qualified pursuant to

the Administrative Procedure Act (5 U.S.C. 1010) or the Judicial Officer (74 Stat. 553, P.L. 86-676). The Chief Hearing Examiner shall assign cases to Hearing Examiners upon rotation so far as practicable. The Judicial Officer may, for good cause shown, preside at the reception of evidence in proceedings where expedited hearings are requested by either party.

(b) The presiding officer shall have authority to:

- (1) Administer oaths and affirmations;
- (2) Examine witnesses;
- (3) Rule upon offers of proof, admissibility of evidence and matters of procedure;
- (4) Order any pleading amended upon motion of a party at any time prior to the close of the hearing;
- (5) Maintain discipline and decorum and exclude from the hearing any person acting in an indecorous manner;
- (6) Require the filing of briefs or memoranda of law on any matter upon which he is required to rule;

(7) Order pre-hearing conferences for the purpose of the settlement or simplification of issues by the parties;

(8) Order the proceeding re-opened at any time prior to his decision for the receipt of additional evidence;

(9) Render an initial decision, which becomes the final Departmental decision unless a timely appeal is perfected: the Judicial Officer may issue a tentative or a final decision.

§ 952.18 Evidence.

(a) Except as otherwise provided in these rules, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern. However, such rules may be relaxed to the extent that the presiding officer deems proper to insure a fair hearing. The presiding officer shall

exclude irrelevant, immaterial or repetitious evidence.

(b) Testimony shall be under oath or affirmation and witnesses shall be subject to cross-examination.

(c) Agreed statements of fact may be received in evidence.

(d) Official notice or knowledge may be taken of the types of matters of which judicial notice or knowledge may be taken.

(e) Authoritative writings of the medical or other sciences, may be admitted in evidence but only through the testimony of expert witnesses or by stipulation.

(f) Lay testimonials will not be received in evidence as proof of the efficacy or quality of any product or thing sold through the mails.

(g) The written statement of a competent witness may be received in evidence provided that such statement is relevant to the issues, that the witness shall testify under oath at the hearing that the statement is in all respects true, and, in the case of expert witnesses, that the statement correctly states his opinion or knowledge concerning the matters in question.

(h) A party who objects to the admission of evidence shall make a brief statement of the grounds for the objection. Formal exceptions to the rulings of the presiding officer are unnecessary.

§ 952.19 Subpoenas.

The Post Office Department is not authorized by law to issue subpoenas requiring the attendance or testimony of witnesses.

§ 952.20 Witness fees.

The Post Office Department does not pay fees and expenses for respondent's witnesses or for depositions requested by respondent.

§ 952.21 Depositions.

(a) Not later than five days after the filing of respondent's answer, any party may file application with the Docket Clerk for the taking of testimony by deposition. In support of such application the applicant shall submit under oath or affirmation a statement setting out the reasons why such testimony should be taken by deposition, the time and the place, and the name and address of the witness whose deposition is desired, the subject matter of the testimony of each witness, its relevancy, and the name and address of the person before whom the deposition is to be taken.

(b) If the application be granted, the order for the taking of the deposition will specify the time and place thereof, the name of the witness, the person before whom the deposition is to be taken and any other necessary information.

(c) Each witness testifying upon deposition shall be duly sworn, and the adverse party shall have the right to cross-examine. The questions and answers together with all objections, shall be reduced to writing and, unless waived by stipulation of the parties, shall be read to and subscribed by the witness in the presence of the deposition officer who shall certify it in the usual form. The deposition officer shall file the testimony taken by deposition as directed in the order. The deposition officer shall put the witness on oath. All objections made at the time of examination shall be noted by the deposition officer and the evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, a party may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim. Objections to relevancy or materiality of testimony, or to errors and irregularities occurring at the oral exami-

nation in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind which might be obviated, cured or removed if promptly presented, are waived unless timely objection is made at the taking of the deposition.

(d) At the hearing any part or all of the deposition may be offered in evidence by any party who was present or represented at the taking of the deposition or who had notice thereof. If the deposition is not offered and received in evidence, it shall not be considered as a part of the record in the proceeding. The admissibility of depositions or parts thereof shall be governed by the rules of evidence.

(e) The party requesting the deposition shall pay all fees required to be paid to witnesses and the deposition officer, and shall provide an original and one copy of the deposition for the official record, and shall serve one copy upon the opposing party.

(f) Within the United States or within a territory or insular possession, subject to the dominion of the United States, depositions may be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; within a foreign country, depositions may be taken before a secretary of an embassy or legation, consul general, vice consul or consular agent of the United States, or any other person designated in the order for the taking of a deposition.

(g) Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination. When a deposition is taken upon written interrogatories and cross-interrogatories, none of the parties shall be present or represented, and no person, other than the wit-

ness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness' own words.

§ 952.22 Transcript.

(a) Hearings shall be stenographically reported by a contract reporter of the Post Office Department under the supervision of the assigned presiding officer. Argument upon any matter may be excluded from the transcript by order of the presiding officer. A copy of the transcript shall be a part of the record and the sole official transcript of the proceeding. Copies of the transcript shall be supplied to the parties to the proceeding by the reporter at rates not to exceed the maximum rates fixed by contract between the Post Office Department and the reporter. Copies of parts of the official record other than the transcript may be obtained by the respondent from the reporter upon the payment to him of a reasonable price therefor.

(b) Changes in the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. No physical changes shall be made in or upon the official transcript, or copies thereof, which have been filed with the record. Within 10 days after the receipt by any party of a copy of the official transcript, or any part thereof, he may file a motion requesting correction of the transcript. Opposing counsel shall, within such time as may be specified by the presiding officer, notify the presiding officer in writing of his concurrence or disagreement with the requested corrections. Failure to interpose timely objection to a proposed correction shall be considered to be concurrence. Thereafter, the presiding officer shall by order specify the cor-

rections to be made in the transcript. The presiding officer on his own initiative may order corrections to be made in the transcript with prompt notice to the parties of the proceeding. Any changes ordered by the Hearing Examiner other than by agreement of the parties shall be subject to objection and exception.

§ 952.23 Proposed findings and conclusions.

(a) Each part to a proceeding, except one who fails to answer the complaint or having answered, either fails to appear at the hearing or indicates in the answer that he does not desire to appear, may, unless at the discretion of the presiding officer such is not appropriate, submit proposed findings of fact, conclusions of law and supporting reasons either in oral or written form in the discretion of the presiding officer. The presiding officer may also require parties to any proceeding to submit proposed findings of fact and conclusions of law with supporting reasons. Unless given orally the date set for filing of proposed findings of fact and conclusions of law shall be within 15 days after the delivery of the official transcript to the Docket Clerk who shall notify both parties of the date of its receipt. The filing date for proposed findings shall be the same for both parties. If not submitted by such date, or unless extension of time for the filing thereof is granted, they will not be included in the record or given consideration.

(b) Except when presented orally before the close of the hearing, proposed findings of fact shall be set forth in serially numbered paragraphs and shall state with particularity all evidentiary facts in the record with appropriate citation to the transcript or exhibits supporting the proposed findings. Each proposed conclusion shall be separately stated.

§ 952.24 Decisions.

(a) *Initial decision by hearing examiner.* A written initial decision shall be rendered with all due speed. The initial decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The initial decision shall become the final Departmental decision unless an appeal is perfected in accordance with § 952.25.

(b) *Tentative or final decision by the Judicial Officer.* When the Judicial Officer presides at the hearing he shall issue a final or a tentative decision. Such decision shall include findings and conclusions, with the reasons therefor, upon all the material issues of fact or law presented on the record, and the appropriate order or denial thereof. The tentative decision shall become the final Departmental decision unless exceptions are filed in accordance with § 952.25.

(c) *Oral decisions.* The presiding Officer may render an oral decision (an initial decision by a hearing examiner, or a tentative or final decision by the Judicial Officer) at the close of the hearing when the nature of the case and the public interest warrant. A party who desires an oral decision shall notify the presiding officer and the opposing party at least 5 days prior to the date set for the hearing. Either party may submit proposed findings and conclusions either orally or in writing at the conclusion of the hearing.

§ 952.25 Exceptions to initial decision or tentative decision.

(a) A party in a proceeding presided over by a hearing examiner, except a party who failed to file an answer, may appeal to the Judicial Officer by filing exceptions in a brief on appeal within 15 days from the receipt of the examiner's initial decision.

(b) A party in a proceeding presided over by the Judicial Officer, except one who has failed to file an answer, may file exceptions within 15 days from the receipt of the Judicial Officer's tentative decision.

(c) If an initial or tentative decision is rendered orally by the presiding officer at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which an appeal must be filed.

(d) Upon receipt of the brief on appeal from an initial decision of a hearing examiner, the docket clerk shall promptly transmit the record of the proceedings to the Judicial Officer. The date for filing the reply to an appeal brief or to a brief in support of exceptions to a tentative decision by the Judicial Officer is 10 days after the receipt thereof. No additional briefs shall be received unless requested by the Judicial Officer.

(e) Briefs upon appeal or in support of exceptions to a tentative decision by the Judicial Officer shall be filed in triplicate with the Docket Clerk and contain the following matter in the order indicated:

(1) A subject index of the matters presented, with page references; a table of cases alphabetically arranged; a list of statutes and texts cited with page references.

(2) A concise abstract or statement of the case.

(3) Numbered exceptions to specific findings and conclusions of fact or conclusions of law of the presiding officer.

(4) A concise argument clearly setting forth points of fact and of law relied upon in support of each exception taken, together with specific references to the parts of the record and the legal or other authorities relied upon.

(f) Unless permission is granted by the Judicial Officer no brief shall exceed fifty printed or one hundred typewritten pages double spaced.

(g) The Judicial Officer will extend the time to file briefs only upon written application for good cause shown. The Docket Clerk shall promptly notify the applicant of the decision of the Judicial Officer on the application. If the appeal brief or brief in support of exceptions is not filed within the time prescribed, the defaulting party will be deemed to have abandoned the appeal or waived the exceptions, and the initial or tentative decision shall become the final Departmental decision.

§ 952.26 Judicial Officer.

The Judicial Officer is authorized (a) to act as presiding officer at hearings, (b) to render tentative decisions, (c) to render final Departmental decisions, (d) to issue Departmental orders for the Postmaster General, (e) to refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final Departmental decision and (f) to revise or amend these rules of practice. The entire official record will be considered before a final Departmental decision is rendered. Before rendering a final Departmental decision, the Judicial Officer may order the hearing reopened for the presentation of additional evidence by the parties.

§ 952.27 Motion for reconsideration.

Within 10 days from the date thereof, or such longer period as may be fixed by the Judicial Officer, either party may file a motion for reconsideration of a final Departmental decision. Each motion for reconsideration shall be accompanied by a brief clearly setting forth the points of fact and of law relied upon in support of said motion.

§ 952.28 Orders.

If an order is issued which prohibits delivery of mail to a respondent it shall be incorporated in the record of the proceeding. The Docket Clerk shall cause the order to be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to place the order into effect.

§ 952.29 Modification or revocation of orders.

A party against whom an order has been issued may file an application for modification or revocation thereof. The Docket Clerk shall transmit a copy of the application to the General Counsel, who shall file a written reply. A copy of the reply shall be sent to the applicant by the Docket Clerk. Thereafter an order granting or denying such application will be issued by the Judicial Officer.

§ 952.30 Supplemental orders.

When the General Counsel or his designated representative shall have reason to believe that a person is evading or attempting to evade the provisions of any such order by conducting the same or a similar enterprise under a different name or at a different address he may file a petition with accompanying evidence setting forth the alleged evasion or attempted evasion and requesting the issuance of a supplemental order against the name or names allegedly used. Notice shall then be given by the Docket Clerk to the person that the order has been requested and that an answer may be filed within ten days of the notice. The Judicial Officer, for good cause shown, may hold a hearing to consider the issues in controversy, and shall, in any event, render a final decision granting or denying the supplemental order.

§ 952.31 Computation of time.

A designated period of time under these rules excludes the day the period begins, and includes the last day of the period unless the last day is a Saturday, Sunday or legal holiday, in which event the period runs until the close of business on the next business day.

§ 952.32 Official record.

The transcript of testimony together with all pleadings, orders, exhibits, briefs and other documents filed in the proceeding shall constitute the official record of the proceeding.

§ 952.33 Public information.

The Law Librarian of the Post Office Department maintains for public inspection in the Law Library copies of all initial, tentative and Departmental decisions. The Docket Clerk maintains the complete official record of every proceeding.

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IN THE
Supreme Court of the United States

October Term, 1969

No. 788

WINTON M. BLOUNT, Postmaster General of the United States, and EVERETT T. CARPENTER, Postmaster of the City of Los Angeles, State of California,

Appellants,

vs.

TONY RIZZI, dba The Mail Box,

Appellee.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

Statement.

This is a direct appeal from a judgment of a three-judge district court, entered on August 1, 1969, restraining the appellants from enforcing the provisions of 39 U.S.C. 4006 against appellee and directing the appellants to vacate an order of the judicial officer of the Post Office Department, executed on or about December 31, 1968, instructing the Postmaster of the

City of North Hollywood, State of California, to return to the sender all mail addressed to appellee (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail. Pursuant to 28 U.S.C. 2201-2202 and 2282-2284, appellee sought a judgment declaring 39 U.S.C. 4006 unconstitutional on its face and as construed and applied, upon the grounds that the statute violated rights guaranteed to appellee under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution. Appellee also prayed for injunctive relief against enforcement of the said statute upon similar grounds. A three-judge court was convened. The court held that the statute was unconstitutional on its face (See Jurisdictional Statement, Appendix A, pp. 15-17); made findings of fact and conclusions of law (Ibid. pp. 17-21); and entered judgment as aforesaid (Ibid. pp. 21-22).

ARGUMENT.

The district court correctly concluded that 39 U.S.C. 4006 is unconstitutional on its face because it fails to meet and conflicts with the standards and criteria enunciated by the Court in *Freedman v. Maryland*, 380 U.S. 51, and *Lamont v. Postmaster General*, 381 U.S. 301. The points raised by appellants are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it is submitted, it would be appropriate for the Court to affirm the judgment below summarily.

1. 39 U.S.C. 4006 provides that upon evidence "satisfactory to the Postmaster General" that a person is obtaining remittances for allegedly obscene matter through the mail, the Postmaster General is authorized to direct Postmasters at the office at which letters or mail arrive to such person to return the letters or mail to the sender marked "Unlawful"; to forbid the payment by a Postmaster to such person of any money order or postal note; and to provide for the return to the remitter the sums named in the money orders or postal notes.

The initial decision with respect to the alleged obscenity under the statute is made without any judicial participation. The administrative regulations call for the filing of the complaint and notice of hearing, which shall not exceed 15 days from the service of the complaint. "Whenever practicable", the hearing date shall be within 30 days of the date of the notice. 952.7 (Jurisdictional Statement, Appendix C, p. 60). When the Judicial Officer presides at the hearing, he shall issue a final or a tentative decision. No time limit is in-

licated. 952.24(b) (Ibid. p. 71). The Judicial Officer is authorized to refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final Departmental decision. 952.26(e) (Ibid. p. 73). It is plain that no effective time limit is imposed for completion of action by the Postmaster General.

The statute places no burden upon the Postmaster General to promptly initiate judicial proceedings and makes no provision for a prompt, final, judicial decision. The statute therefore authorizes a prior restraint without any safeguards for the exercise of freedoms of speech and press guaranteed by the First Amendment.

2. In light of the foregoing, the statute plainly contravenes the rulings of this Court in *Freedman v. Maryland*, 380 U.S. 51, and *Teitel Film Corp. v. Cusack*, 390 U.S. 139. See also, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181-182. In *Freedman*, this Court made plain that "any system of prior restraints of expression" comes to the court bearing a heavy presumption against its constitutional validity. Due process requires initially that the burden of proving that material is unprotected expression must rest upon the agency which seeks to forbid the expression. Moreover, the State must give assurance that the suppressing agency will, "within a specified brief period", go to court to obtain a judicial determination. The statute must also "assure a prompt final judicial decision" to minimize the deterrent effect of an interim and possibly erroneous suppression of constitutionally protected material. A statute which fails to provide such adequate safeguards against undue inhibition of

protected expression runs afoul of the guarantees of the First and Fifth Amendments. As this Court stated in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682, "There has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action".¹

3. As the district court below correctly observed: "The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed." (Jurisdictional Statement, Appendix A, p. 16). The statute also limits the unfettered exercise of the right of persons to willingly receive publications. Therefore, 39 U.S.C. 4006 undermines the "fundamental right" to receive publications and unconstitutionally imposes obligation to obtain the material which the First Amendment was intended to prevent. The deterrent effect upon senders and receivers creates inhibitions on the dissemination of ideas, forbidden by the guarantees of the First Amendment. *Lamont v. Postmaster General*, 381 U.S. 301.²

¹A recent decision by a three-judge court in the United States District Court for the Central District of California (Barnes, Circuit Judge, and Curtis and Ferguson, District Judges) held that 19 U.S.C. 1305 is unconstitutional in violation of the free speech and press and due process provisions of the First and Fifth Amendments, reliance being placed upon the decisions of this Court in *Freedman v. Maryland*, *Lamont v. Postmaster General*, and *Stanley v. Georgia*, 394 U.S. 557. *United States v. Thirty-Seven (37) Photographs*, Civil No. 69-2242-F. A copy of the opinion of the district court is attached hereto as Appendix A.

²There were other contentions raised by appellee which the district court did not reach (Jurisdictional Statement, Appendix A, p.16). These included the unconstitutional invalidity of the statute because (1) the statute authorizes an administrative agency to suppress material without a judicial proceeding; (2) to suppress without the protections of a jury trial; (3) to suppress (This footnote is continued on the next page)

4. Appellants' arguments are devoid of merit. It is urged that the statute is constitutional because unlike *Freedman*, the Post Office "was not created for the business of censorship" (Jurisdictional Statement, p. 7); that "subsequent" judicial review proceedings, while limited to the administrative record, would still permit the reviewing court to review the materials in question and determine whether they could support the administrative determination. It is argued that "this may suffice to demonstrate the constitutionality of the statute" (Jurisdictional Statement, p. 7). The argument is plainly untenable. The question is not whether an agency was created for the "purpose of censorship"; the real issue is whether "any system of prior restraints of expression" can be imposed by a statute without the safeguards demanded by the requirements of the First Amendment. The concededly limited "subsequent judicial review" which the appellee must seek is not enough to satisfy the constitutional requirements. *Freedman v. Maryland*; *Lamont v. Postmaster General*; *Hannegan v. Esquire*, 327 U.S. 146.

The appellants suggest that "if serious question remains", regarding the fact and timing of judicial supervision, "a limited construction" is available to meet "those doubts" (Judicial Statement p. 7). It is suggested that "it would be appropriate to treat any appeal of a Section 4006 order as automatically staying its effect, where a Section 4007 judicial order for temporary

press without the safeguards of proof of *scienter* and the essential elements of obscenity; (4) the statute is vague, ambiguous and overbroad; (5) the statute authorizes the Post Office to engage in invidious discrimination between constitutionally protected material and comparable material which the agency, for subjective reasons, deems obscene; and (6) the publications were not obscene and were entitled to constitutional protection.

detention of mail was not then in effect". It is conceded that even such a construction would require the mailer to take the initiative of filing an appeal, but it is contended that this burden only "slightly taints the statutory scheme" (Jurisdictional Statement p. 8). This call for judicial construction is fruitless. In the first place, it is an inappropriate request for judicial legislation. "Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." *United States v. Calamaro*, 354 U.S. 351, 357. In the second place, the statute as rewritten would plainly be contrary to Congressional purpose. In the third place, if the mail is to flow until a judicial determination is made (Jurisdictional Statement p. 9), prior administrative proceedings and decisions are unnecessary. Finally, the "chilling effect" of the administrative proceedings and determinations would remain. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Freedman v. Maryland*; *Lamont v. Postmaster General*.

Conclusion.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellee.

APPENDIX A.

Memorandum Opinion.

United States of America, Plaintiff, v. Thirty-Seven (37) Photographs, Defendants, Milton Luros, Claimant. Civil No. 69-2242-F.

Before: Barnes, Circuit Judge, and Curtis and Ferguson, District Judges.

Ferguson, District Judge:

This is an action before a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine whether the government should be enjoined from enforcing 19 U.S.C. § 1305. That statute prohibits all persons from importing into the United States any obscene picture or book. It provides that when such an item appears at a customs office it shall be seized and held to await the judgment of a district court.

On October 24, 1969, Milton Luros returned to Los Angeles from a visit to Europe, arriving by plane. In his personal luggage he carried 37 photographs. In the course of an inspection, customs agents acting under authority of § 1305 seized the photographs as obscene. The agents referred the seizure to the United States Attorney, and on November 6, 1969, the government filed its complaint seeking judicial authority to enforce the forfeiture of the photographs.

On November 14, 1969, the claimant filed an answer contending the photographs were not obscene. His counterclaim contends that § 1305 violates the First and Fifth Amendments, and seeks an injunction to restrain the government from enforcing the statute in relation to the 37 photographs.

The case presents a five-fold constitutional attack on § 1305, claiming that:

(1) It excludes from the United States photographs imported for use by adults in the privacy of their home.

(2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.

(3) It permits customs agents to seize and hold pictures without a time restraint.

(4) It permits a seizure prior to an adversary hearing.

(5) It is unconstitutionally vague.

The cornerstone of the attack, of course, is *Stanley v. Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis v. Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

19 U.S.C. § 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which

is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

A second attack on the statute further involves *Freedman v. Maryland*, *supra*. Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the first and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2)

the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

In the context of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

We are aware of *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 889, 899 (2d Cir. 1966), which stated, "[S]pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme. . . ." That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman*, *supra* at 58-59, "[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period . . . go to court. . . ." We must follow *Freedman*.

We decline to consider as unnecessary the remaining attacks on the constitutionality of § 1305, i.e., (1) vagueness and (2) the law set forth in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this memorandum opin-

ion shall constitute the court's findings of fact and conclusions of law.

In accordance with the provisions of Rule 58, a judgment shall be separately prepared and entered as follows:

"1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

"2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

"3. The United States shall deliver said photographs to the claimant.

"4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

"5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal."

Dated this 27th day of January, 1970.

/s/ WARREN J. FERGUSON

Warren J. Ferguson

United States District Judge

We Concur: /s/ STANLEY N. BARNES, Stanley N. Barnes, United States Circuit Judge. /s/ JESSE W. CURTIS, Jesse W. Curtis, United States District Judge.

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IN THE
Supreme Court of the United States

October Term, 1969

Nos. 788 and 812

**UNITED STATES OF AMERICA and the
POSTMASTER GENERAL,**
Appellants,

v.

THE BOOK BIN,
Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION TO DISMISS OR AFFIRM

Appellee, in the above entitled case, moves this Honorable Court to dismiss the appeal herein on the grounds hereinafter set forth, or in the alternative to affirm the judgment sought to be reviewed on the appeal upon the grounds that it is

manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Statement of the Case.

The Appellee is engaged inter alia in the sale, distribution and offering for sale and distribution of nudist magazines, and male and female nude photo art publications, books and other presumptively protected *First Amendment* materials. This distribution is conducted from its premises at 267 Marietta Street, N.W., Atlanta, Georgia, 30313. During the course of its dissemination of these materials the Appellee has utilized the services of the United States Post Office by mailing publications, communications and other materials. The Appellee is also the recipient of large amounts of correspondence, requests for publications, and remunerations similarly delivered through the services of the United States Post Office.

The Appellant initially subjected the Appellee to the administrative procedures pursuant to 39 U.S.C. 4006 based upon the allegation that a certain magazine, i.e., "Models de France" was deemed obscene by the postal authorities and that this purportedly obscene magazine was being sent through the United States mails.

The Appellant then proceeded to invoke the procedures of 39 U.S.C. 4007 seeking a Temporary Restraining Order and a Preliminary Injunction for the detention of all Appellee's incoming mail during the pendency of the administrative proceedings. The Appellant averred the need for the order was to preserve the *status quo* and to permit effective enforcement under the correlative administrative proceedings. Willingness on the part of the government was stated, that the

Appellee be entitled to the opening of the detained mail and subsequent examination and then to have delivery if such mail is clearly not connected with the purportedly unlawful activity.

Under 39 U.S.C. 4006, the Postmaster General is given the right to stamp "unlawful" upon mail addressed to the Appellee and return it to the sender if he finds the statutory criteria is met upon "evidence satisfactory to (him)".

Upon completion of all the statutory proceedings, the burden of seeking judicial review falls upon the party against whom an order to deny the delivery of mail was issued. The burden of proof then shifts to the party seeking the aid of the court to show that the administrative order is improper.

Under both the administrative procedure and the judicial procedure in aid of the 4006 enforcement, any denial of receipt of mail or delivery thereof, by necessity, also prohibits the receipt of mail items unconnected with the purportedly obscene materials involved in the controversy without the affirmative duty upon the intended recipient to seek the opening of and the examination of the materials and the showing to the postal authorities that the materials are clearly unconnected with the allegedly unlawful activity.

The Appellant, in application to the United States District Court, merely has the duty of showing "probable cause" in order to obtain the temporary detention of Appellee's incoming mail "pending the conclusion of the statutory proceedings and any appeal therefrom." Should the District Court not find even the minimal requirement of probable cause involving Appellee's *First Amendment* rights, sufficient to deny the delivery of mail, it does not in any way prohibit the continuation of the administrative proceedings since 4007

provides that the grant or denial of the detention order "does not affect or determine any fact at issue in the statutory proceedings."

No Substantial Question is Presented.

A. The rulings were clearly correct and the law is settled.

United States District Courts from two circuits have been presented with the question of the constitutionality of 39 U.S.C. 4006. Each of these Courts were constituted under the statutory scheme providing for a Three Judge Court. Each of the panels came to the same unanimous conclusion that 39 U.S.C. 4006 was unconstitutional upon its face in independent proceedings. Both the Courts came to the same conclusion upon questions of fact and questions of law. The United States of America and the Postmaster General have elected to appeal these unanimous decisions.

This Court can affirm the decisions rendered below without further review whenever the rulings are found to be clearly correct, *Eichel v. U.S. Fidelity and Guarantee Co.*, 242 U.S. 102.

This Court can affirm a lower court judgment where the rulings are correct upon the record and pleadings. This is true although the grounds for the decision on appeal may be different, *Bond v. Moore*, 93 U.S. 593.

This Court has previously settled the law, in cases of this kind, and has prohibited Postal authorities from erecting postal blocks, *Lamont v. Postmaster General*, 381 U.S. 301, and hence the Court can affirm the judgments of the lower courts as the appeal is frivolous, *Pennsylvania Co. v. Donat*, 239 U.S. 50.

In both cases presently on appeal, the Postal authorities contend the statute reflects a proper legislative purpose, i.e., curbing the commercial exploitation of pornographic matter through the mails. It is also contended that the procedure is analogous to that employed in the prevention of frauds and lotteries in using the mails. Yet neither of those crimes are present in the dissemination of presumptively protected *First Amendment* materials.

The United States District Court herein had before it the additional question of the constitutionality of 39 U.S.C. 4007. The Appellee on or about June 10, 1969, was served with a complaint under 39 U.S.C. 4006 charging that the magazine "Models de France" was obscene and was being distributed by the Appellee. A hearing was set forth and subsequently postponed. On June 13, 1969, the Appellant notified the Appellee that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. 4007 in the United States District Court. Under 4007, the court was granted the authority to issue such orders upon the showing of "probable cause," and direct the detention of all of the Appellee's incoming mail from the date of issuance of the order until the conclusion of the statutory administrative proceedings and any appeal therefrom. It would then effectively set up a mail block of all incoming mail irrespective of the content and irrespective of the similarity to the purportedly obscene magazine. To that extent mail of a religious nature as well as mail from any and all sources would be impounded. It would then become the duty of the intended recipient to secure the opening and examination of the incoming mail and show the mail was clearly not connected with the alleged unlawful activity before it would be released and delivered. On June 12, 1969, a complaint was filed in the United States District Court for the Northern District of Georgia by the United States of America and the

Postmaster General seeking the mail block against The Book Bin. An attack was subsequently made upon the constitutionality of 39 U.S.C. 4007 by Appellee and requested the convening of a Three Judge Court. This request was in conjunction with the attack on 4006, *supra*. The District Court found that Section 4007 complements Section 4006 and the two sections had to be interpreted together. This decision is correct in that the actual mail block order is set up following the institution of the administrative proceedings and in supplement thereof.

As stated before, this Court can affirm the lower court's decision without further review whenever the rulings are found to be clearly correct. Additionally, this Court can affirm a lower court decision when the law in this area is settled as it has been in *Lamont v. Postmaster General, supra*, and hence the Court can affirm the judgments of the lower court as the appeal is frivolous, *Pennsylvania Co. v. Donat, supra*.

Suffice it to say that should a mail block be imposed merely upon the showing of "probable cause" it would extend until the matter is heard and determined in the administrative proceedings. If an adverse ruling is received all the administrative appeals must be exhausted before reaching the courts. And even when it is ripe for determination in the courts the burden is upon the moving party to affirmatively convince a court that the administrative finding was erroneous. Such proceedings and appeals are costly in time irrespective of monetary value. And in the interim the mail recipient is ostracized from the flow of mail. Such a burden upon the sending and receipt of presumptively protected materials is repugnant to the freedoms secured to Appellee under the *First Amendment* to the *Constitution of the United States*.

B. Criminal statutes are in force and should be used to penalize violators of postal laws.

While obscenity is subject to regulation and proscription, the statute of necessity must conform to those procedures that do not inhibit the free exercise of speech and press that are protected. These enactments do not protect these freedoms but engulf them in an all encompassing statute, the good and the bad.

Congress has seen fit to regulate obscenity in the mails, 18 U.S.C. 1461, and has provided criminal penalties for engaging in such conduct. Appellant contends that the statutes herein reflect an intention of Congress to curb the commercial exploitation through the mails of pornographic matter. Congress, however, has already provided a criminal penalty for such violations. A criminal statute, however, requires the burden of proof to be beyond a reasonable doubt, and it of necessity must follow an adversary hearing with the burden of persuasion upon the enforcement officials. The converse is true under these statutes. Postal authorities need only institute the necessary administrative proceedings within the Post Office Department to be in the position of seeking and obtaining a mail block. In enforcing the mail block aided by an injunction order, they need only show "probable cause." There is no judicial finding of obscenity of the particular material. Additionally, a completely effective mail block is imposed with no resultant distribution. The recipient then must of necessity take certain actions in order to receive any mail and then only when it is shown that the mail matter is clearly unconnected with the allegedly obscene material.

The Postal authorities, in proceeding under these statutes, are engaging in the practice of censorship of *First Amendment*

freedoms which have been variously condemned by the courts including this Court, *Freedman v. Maryland*, 380 U.S. 51. There can be no other purpose in condemning a particular publication and seeking such a sweeping, all encompassing order. The mere fact that a United States District Court does not find "probable cause" and refused to enter an order does not remove the threat in any degree. For this in no way prevents the Postmaster General from finding a violation of Section 4006, and subsequently imposing the restrictions permitted under that section, all of which may occur without any prior judicial hearing on obscenity. This could not occur if the Postal authorities were required to proceed under the criminal statute presently in force.

While "prior restraints" are not in and of themselves invalid, any prior restraint of *First Amendment* rights bears a heavy presumption of invalidity, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175.

Procedurally we have built-in delay. The administrative procedures established by regulation under Section 4006, see 39 C.F.R. Sections 952.1, et seq., do not provide the minimal procedural safeguards enunciated by this Court in *Freedman*, supra. The procedures provide that a hearing must be provided, "(w)henever practicable. . . within 30 days of the date of the notice" of the hearing, 39 C.F.R. Section 952.7. In the matter presently before this Court a hearing was set four weeks after service of the complaint against Appellee, which later was postponed. Following a hearing the Postal Examiner is required to issue his findings with "all due speed," 39 C.F.R. Section 952.24. In the event the hearing examiner's decision is adverse, an appeal must be taken to exhaust all administrative remedies. This appeal must be taken within 15 days of the examiner's decision, 39 C.F.R. Section

952.25. On appeal there is no limitation on when the decision must be given. Moreover, 39 C.F.R. Section 952.27 permits an Appellant under the postal laws to file a motion for reconsideration of the final departmental decision. In the interim all of the Appellee's incoming mail may be detained under an order, if obtained under Section 4007, merely upon the showing of "probable cause." At this point the mail recipient must then apply to the courts for any relief that may be forthcoming, with the burden upon him to show that the administrative decision was erroneous. Needless to say the Court in *Freedman v. Maryland*, *supra*, did not envision such a protracted delay in the vindication of *First Amendment* rights.

Appellant makes a distinction between a board created for the express purpose of censoring versus the Post Office Department that was not created for such a purpose. Logic and facts in the case at bar will show that irrespective of the motivation creating an agency, the agency may embark upon the duties of a censor. This is amply shown in the case at bar. Were it not for the Postal authorities embarking upon the course of attempting to set up a mail block based upon the alleged obscenity of a named publication this matter would not now be before this Court. These same authorities had another route of procedure in instituting criminal sanctions under 18 U.S.C. 1461 which would have provided a prompt judicial determination of the violation in the atmosphere of an adversary hearing. These same authorities decided to forego such a hearing and proceed in the manner of a censor and attempt to set up a complete mail block. In this manner the Postal authorities may in and of themselves determine what is proscribable and inhibit if not prevent the recipient's use of the mails, irrespective whether the recipient has ever been convicted of a crime.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative decision or in combination with a sweeping order under *Section 4007*, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"...the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

The New York Court of Appeals in *People v. Richmond County News*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 360, 175 N.E. 2d 681 (1962) stated:

"...if an Appellate Court were to rely upon and be bound by the opinion of the trier of facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

The Supreme Court of the State of California in *Zeitlin v. Arnenberg*, 59 C. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152 (1963) stated:

"...they raise issues, not of ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; *the court itself must determine the law of the case* for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene." (59 C. 2d at P. 908, 909. (Emphasis supplied).

The opinion of this Court in *Jacobellis v. Ohio*, 378 U.S. 184 in discussing the issue of fact versus law judgment stated:

"...we are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence'. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

Kingsley Int'l. Pictures Corp. v. Regents, 360 U.S. 684, 708, 3 L ed 2d 1512, 1527, 79 S Ct 1362 (separate opinion):

"It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final board

of censorship. But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process..."

Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 115 (1960):

"This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts in the form of determinations of fact—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised."

U.S. v. One Obscene Book Entitled Married Love, 48 F. 2d 821 (1931):

"...this court must determine, as a matter of law in the first instance, whether the book alleged to be obscene falls in any sense within the definition of that word."

U.S.A. v. A Motion Picture Film Entitled, "I Am Curious Yellow," 404 F. 2d 196 (1968):

"However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the Court..."

See also: *Manual Enterprises v. Day, 370 U.S. 478, 8 L ed 2d 639 at page 647. United States v. 4,400 Copies of Magazines, etc. 276 F. Supp. 902 (1967).*

C. Postal Blocks Are Prohibited.

Postal blocks are clearly repugnant to the *Constitution of the United States*. This Court has settled the law that postal blocks are unconstitutional by placing a duty upon the restricted recipient to act in order to enjoy the free use of mail distribution. The power of censorship has never been given to the Postmaster General. This Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 stated the following of the censorship power undertaken there by the Postmaster General:

"An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred. (Emphasis supplied)

...

"We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the Court held in *ex parte Jackson*, 96 U.S. 727, 24 L ed 877, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.

...

"What seems to one to be trash may have for others fleeting or even enduring values.

...

"But the power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare."

And in *Martin v. Struthers*, 319 U.S. 141, this Court dealt with a municipal ordinance forbidding the door to door dissemination of pamphlets and periodicals. It was stated:

"The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

How different is it that the judgment of the recipient and disseminator of *First Amendment* materials is substituted in the case at bar for the judgment of the Postmaster General and other postal authorities.

And again as stated as early as 1921 in the case styled *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, in Justice Holmes' dissenting opinion, at page 437:

"The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."

This Court had before it another case involving obscene mail matter in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. The Court struck down the lower court ruling but could not

agree upon a single opinion. However, Mr. Justice Brennan and two other members of the Court in a separate opinion stated:

"We have sustained the criminal sanctions of Sec. 1461 against a challenge of unconstitutionality under the *First Amendment*. *Roth v. United States*, 354 U.S. 476, 1 L ed 2d 1498, 77 S Ct 1304. We have emphasized, however, that the necessity for safeguarding *First Amendment* protections for nonobscene materials means that Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731, 6 L ed 2d 1127, 1136, 81 S Ct 1708. I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts."

Mr. Justice Brennan then cited with approval a quote from one of the Court's prior decisions entitled *Hannegan v. Esquire, supra*:

"The provisions...would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. *Hannegan v. Esquire, Inc.* 327 U.S. at 156, 90 L ed 586, 66 S Ct 456. I, therefore, concur in the judgment of reversal."

- D. Use of the mails is a right and not a privilege subject to arbitrary denial by postal authorities.

The Court in *Lamont v. Postmaster General*, 381 U.S. 301 quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the Coyne case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But

when habit and law combine to exclude every other (means of transportation of mail) it seems to me that the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution. . ."

The United States Court of Appeals for the Fifth Circuit in the matter entitled *Hiatt v. U.S.*, 415 F. 2d. 664, reversed the United States District Court for the Western District of Texas wherein the Appellant there was convicted of using the mails to solicit business in procuring foreign divorces. The Court there reviewed the history of power granted to the postal authorities in regulating the use of the mails. It then stated the restrictions upon the use of such power together with the rejection of the proposition that the use of the mails was a privilege and could be denied or restricted at the option of the postal authorities. The court stated:

"However, it is one thing to say, as the cases hold, that a power of Congress may legitimately be used to protect the public health, safety, welfare, or morals, and quite a different thing to say, as appellee apparently says, that its use of police power purposes automatically overrides the specific limitations on

Congressional power that are contained in the Bill of Rights. Admittedly, the freedom of speech is not absolute; but neither may the powers of Congress, even though delegated by the Constitution, be regarded as absolute, since they would obliterate the first amendment if asserted to their logical extreme. Thus both the commerce power and the tax power have been held to be circumscribed by the first amendment. See *Red Lion Broadcasting Co. v. FCC*, 1969, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371; *Murdock v. Pennsylvania*, 1943, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1291. Similarly, regulation of speech through the postal power, although it is authorized where necessary to effect legitimate legislative ends, is to be tested against the first amendment.

...

"We find that the trend of cases, and especially the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits. The need for Congress to respect the provisions of the Bill of Rights in the exercise of the postal power has long been emphasized.

...

"The now-famous Holmes dissent in *Milwaukee Social Democratic Pub. Co.* states that '(t)he United States may give up the post office when it sees fit, but while it carries it on the use of mails is almost as much a part of free speech as the right to use our tongues.' In another dissent, in the Roth case, Mr. Justice Harlan wrote: 'The hoary dogma of *Ex parte Jackson**** and *Public Clearing House v. Coyne**** that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated.' In Roth, if not in Milwaukee, the majority clearly agreed, because it discussed at length the question whether obscene materials sent through the mail constituted protected

speech, an inquiry that would have been meaningless had the Court subscribed to the privilege doctrine."

- E. Erection of a mail block is censorship, and censoring may only be done by incorporating certain procedural safeguards.

Those restrictions, in the form of a mail block, upon freedom of speech and press are not permissible without the burden being placed upon the censor to seek final judicial determination within a brief specified period of time. Such burdens are not incorporated within the postal statutes at issue. This Court has previously held that such all encompassing censorship laws are repugnant to the *First Amendment* to the *Constitution of the United States*. This Court had a similar proposition before it in *Freedman v. Maryland*, 380 U.S. 51. That matter involved censorship of Motion Picture films permitted under a Maryland statutory scheme. Even though the matter there was based upon a censorship and licensing statute the analogy is present in that it involved an attempt to censor and prevent the dissemination of *First Amendment* materials. This Court held that the Maryland statutory scheme was repugnant to the freedoms guaranteed to the citizens by virtue of the *First Amendment*. The Court stated much of the criteria necessary to be procedurally incorporated before the infirmity would be removed.

"In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

"Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court — part of an independent branch of government — to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

"Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, 2 L. ed. 2d 1460, 1473, 78 S. Ct. 1332, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination is an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

This Court then held that the censor must institute the judicial proceedings and then have the burden of persuasion before the court.

In this context we must look at the statutory scheme under which the Postmaster General is proceeding. First and

foremost there is no adversary proceeding bearing upon the issue of obscenity prior to the administrative hearing or the complaint seeking a Temporary Restraining Order and Temporary Injunction. After the initial determination by the hearing officer all administrative appeals must be undertaken by the mail recipient. His incoming mail may be detained during the interim only upon an *ex parte* showing of "probable cause." An adverse ruling would necessitate the recipient to institute review in the courts of the administrative ruling. In effect relief judicially is either too little under Section 4007 or too late under Section 4006.

This Court has at various times had to rule upon actions taken under the postal regulations. A case of similar import to the one at bar was heard and decided and styled, *Lamont v. Postmaster General*, 381 U.S. 301, wherein the issue was one involving detention of mail that was deemed to be communist political propaganda. It was found that the detention once enacted required action upon the recipient's part in order to receive such detained mail. This requirement was found to be unconstitutional and repugnant to the safeguards of the First Amendment. Mr. Justice Douglas expressing the views of seven members of the Court stated variously:

"We conclude that the Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437, 65 L. ed 704, 720, 41 S. Ct. 352 (dissenting): 'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . .'"

and Note 3 thereunder:

"3. 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.' *Pike v. Walker*, 73 App DC 289, 291, 121 F2d 37, 39. And see Gellhorn, *Individual Freedom and Governmental Restraints*, p. 88 et seq. (1956)."

The Court then continued stating the limitations upon Congress by virtue of the *First Amendment*:

"Here the Congress — expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 90 L ed 586, 66 S. Ct. 456, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage.

...

"The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."

Mr. Justice Brennan with Mr. Justice Goldberg in a separate concurring opinion enunciated:

"However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.' *Martin v. City of Struthers*, 319 U.S. 141, 143, 87 L ed 1313, 1316, 63 S. Ct. 862. Since the decisions today uphold this contention, I join the Court's opinion.

"It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497,...

...

"I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

...

"But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, e.g., *Freedman v. Maryland*, 380 U.S. 51.

...

"...the statute under consideration, on the other hand, impedes delivery even to a willing addressee.

...

"If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights."

The United States District Court for the Northern District of California in the matter styled *Alan Kalker v. Lim P. Lee*, No. 51488, decided September 22, 1969, had before it a matter involving enforcement of a postal regulation, 39 C.F.R. Section 262 wherein postal authorities were permitted to detain any letter suspected of containing prohibited matter and seek authorization to open it and examine the contents if the letter was mailed from a foreign country. If such permission was not given the postal authorities could stamp the letter "unclaimed" and return it to the sender. The contention of the Petitioner in that matter was to the effect that he would concede the right of the postal authorities to open the mail and examine the contents in line with the customs power of the federal government. He disagreed, however, with the provision permitting the postal authorities to stamp the letter as unclaimed in the event permission from him was not forthcoming and thereafter to return the letter to its origin. The court held that upon this ground the postal regulation was invalid. The ruling only affected the regulation providing for the return of the letter and did not bear upon the issue of holding the letter and inspecting it. The court merely held that the portion of the regulation found as invalid was "an unreasonable and oppressive limitation on Plaintiff's right to receive such, if any, mailable, i.e., non-prohibited matter as may be contained in the letter."

This same thesis is analogous to the case presently before this Court. The attempt by the Postmaster General to conduct a departmental hearing and thereby refuse to honor money orders payable to the Appellee and to stamp all incoming mail directed to the Appellee as "unlawful" and returning the same to the sender together with the seeking of an order from a

United States District Court for the temporary detention of any and all of the Appellant's incoming mail is an unreasonable and oppressive limitation upon Appellee's right to receive such, if any, mailable matter as may be directed to him and deliverable through the postal facilities.

The fact that the proceedings were brought against Appellee has had a "chilling effect" upon the exercise of his *First Amendment* rights. An inhibition as well as a prohibition are equally denied to the government in the *First Amendment* area, *Lamont v. Postmaster General, supra*, at page 309 (Brennan, J., concurring); see also *Boyd v. U.S.*, 116 U.S. 635. It makes no difference if the action is aimed at the denial of remittances received for the distribution of the material itself. For in such a case the mail recipient is likely to restrict or end distribution of material during the pendency of such proceedings.

F. Section 4007 as written is a denial of equal protection of the laws as applied to First Amendment freedoms.

Another infirmity in the statutory enactment of *Section 4007* is the vice of a "denial of equal protection of the laws." Under Sub-section (b), a provision that permits and specifies certain exempt publishers and their agents, the Appellee is separated from this arbitrary classification.

"(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers."

While it is true that the *Fourteenth Amendment* to the *Constitution of the United States*, which contains a specific provision against such laws enacted by the several states, does not apply to the federal government, the government is precluded from depriving a citizen of life, liberty or property,

without due process of law under the *Fifth Amendment*. The writers of the federal Constitution saw fit to enumerate certain powers of Congress. However, many contained specific directions that the authority must be applied uniformly, i.e., "Duties, Imports and Excises," "Naturalization," "Bankruptcies", etc. When applying this principle together with reading the four corners of the Constitution it can readily be seen that when the *First Amendment* was written it was meant not only to prevent Congress from denying freedom of speech and press to all citizens but similarly Congress was precluded from denying the freedom to some of the citizens and exempting others from the prohibition. Under this exemption a publisher of materials holding a second class matter classification will not be subjected to a 4007 as Appellee has been.

Although much of the problem involving the denial of "equal protection" has arisen from state proceedings the principles are applicable here in the case at bar. This Court stated the problem of such a denial in *McLaughlin v. Florida*, 379 U.S. 184:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

And in *Cox v. Louisiana*, 379 U.S. 559, this Court reversed a state court conviction and while holding the statute unconstitutional as a denial of equal protection of the laws among other reasons had this to say:

"This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be

permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.

...
 "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power, or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."
 (Emphasis supplied)

The Supreme Court ruled a Maryland conviction for disorderly conduct was a denial of equal protection of the laws in *Niemotko v. Maryland*, 340 U.S. 268. The Court there had this to say of regulations of *First Amendment* freedoms:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

...
 "No standards appear any where; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.

...
 "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments,

has a firmer foundation than the whims of personal opinions of a local governing body."

And in a case styled *Griffin v. Illinois*, 351 U.S. 12, the Court ordered the state to supply the defendant with a transcript as an indigent, concluding the denial of a free transcript for an indigent was not affording equal protection of the laws whereas a person with sufficient means could pay for the service. The Court reflected upon the evolution of the right and the Illinois denial thusly:

"These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court.

...

"Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

...

"Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."

See also *Burns v. Ohio*, 360 U.S. 252.

With this as a background our attention is brought to the statutes in issue. We find that the Congress has, by virtue of *Section 4007* excepted certain classes of people from its effect.

In retrospect we find that such an exemption is not afforded to all vendors utilizing the mails of magazines presumptively protected under the *First Amendment*.

The United States Supreme Court in a case styled *Morey v. Doud*, 354 U.S. 457, condemned an Illinois statute for creating unequal exemptions and stated:

"This is not a case in which the *Fourteenth Amendment* is being invoked to protect a business from the general hazards of competition. The hazards here have their root in the statutory discrimination.

...

"Taking all of these factors in conjunction — the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages — we hold that the application of the Act to appellees deprives them of equal protection of the law."

The Court of Appeals for the State of Maryland in a case styled *Police Commissioner of Baltimore City v. Siegel Enterprises*, 162 A 2d 727 (1960), had before it the Maryland Obscenity Statute wherein newspapers were not included within the framework of the proscribed dissemination. The Court there held the provision invalid as a denial of equal protection of the laws. The Court held:

"Freedom of the press is directly affected as to one class of publication but not as to another, and the

classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment.

...

"The discriminations between classes of publications which are infringements of the Equal Protection Clause inhere in every provision of the statute."

The Supreme Court of California also dealt with this problem in the case of *Katzew v. County of Los Angeles*, 341 P 2d 310 wherein the Court there found that the statute applied to the publications but exempted newspapers from its proscription. The Court there stated:

"The ordinance denies distributors such as plaintiffs equal protection of the laws, since it establishes arbitrary and unreasonable exemptions.

...

"Because these exemptions are unrelated to the purported purpose of the legislation, they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws. An exemption must be reasonable in order to meet the standard prescribed by *Yick Wo v. Hopkins*, ...

...

"Unlike the exemptions for accounts of crime that are true or drawn from religious writings, this latter one is not based on content, nor is it a completely different form of presenting a story. Rather, the exemption is based solely on the nature of the product produced on paper."

Likewise the State of Washington declared a state statute unconstitutional for containing arbitrary classification. In the case styled *Adams v. Hinkle*, 322 P 2d 844, the Court rejected the statute for exempting newspapers from comic book licensing requirements although the Court found various other portions deficient in the area of *First Amendment* freedoms:

"The Attorney General earnestly contends that this is a reasonable classification, and that the legislature has a right to classify if there be a rational basis for the classification. But this is not so when the equal protection clause is concerned with a right claimed under the First Amendment.

...

"When the rights claimed are among those protected from legislative invasion by the First Amendment, the equal protection clause of the Fourteenth Amendment assumes increased importance.

...

"Even if considered separately from a right guaranteed by the First Amendment, the constitutionality of such a classification is precarious at best."

The United States Supreme Court in *Yick Wo v. Hopkins*, 30 L ed. 220 at page 225 delineated much of the protection afforded citizens wherein the Court stated at page 225, reaffirming its prior decisions:

"...in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

...
 "...undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. . . Class legislation, discriminating against some and favoring others, is prohibited."

The Defendant is exposed to prosecution under *Section 4007* while the proprietor or employee of another book store may only be subjected to the provisions of *Section 4006*, simply for the dissemination of a publication. There can be no reasonable classification between Appellee and publishers entering material as second class matter. Therefore, this statute lays an unequal hand upon the Appellee in relation to other disseminators of *First Amendment publications*.

In amplification and clarification, should the holders of a second class matter permit for publications deposit the magazine, "Models de France" in the mail for delivery, then the Postal authorities would not be able to go to a United States District Court seeking a Temporary Restraining Order or a Temporary Injunction impounding that publisher's or his

agents incoming mail. Such was not the case as regards Appellee.

G. Sections 4006 and 4007 constitute an invalid prior restraint and create a chilling effect upon first amendment freedoms.

In instituting proceedings under Section 4006, the Postal authorities have invoked an unlawful "prior restraint" and created a "chilling effect" upon Appellee's protected freedom of speech and press and his constitutional right to use the mails by not first observing the constitutional mandate that an adversary judicial proceeding be held to determine the issue of obscenity *vel non*. The Section 4006 proceeding may eventually arrive at a point where all of Appellee's presumptively protected incoming mail will be stamped "Unlawful" and returned to the sender. Similarly, the Appellee would be precluded from receiving remunerations from money orders payable to him. To prevent this, the Appellee would have two alternatives: (1) completely cease using the mails either for deposit or receipt; or (2) utilize all avenues of administrative appeal and assume the burden of seeking relief in the courts. In the interim period, Appellee's constitutional right to receive mail leading to the dissemination of presumptively protected *First Amendment* publications has been "chilled" by the shadow of the Censor's heavy hand.

By like instance, in seeking an *ex parte* order under Section 4007, the postal authorities attempted to foreclose Appellee's unfettered receipt of all mail by a postal mail block. It would take a hardy individual to forward mail knowing that any and all replies would be held under a court order until each item was determined to clearly not be connected with the purportedly obscene mailings. Such an order may be issued *ex parte* since "probable cause" is all the Postmaster General must show and a postal block may be effected without first focusing on and determining the issue

of obscenity *vel non* of the challenged material. Risk of delay in the final judicial determination of the allegedly obscene mailings is inherently built-in to the procedures provided for under Sections 4006 and 4007.

This Court, in numerous cases, has repeatedly condemned invalid "prior restraints" upon the free exercise of those fundamental freedoms guaranteed under the *First Amendment*. These cases clearly support the proposition that "prior restraints" of the type sought here by the Postmaster General are constitutionally invalid for lack of proper procedural safeguards in the sensitive area of freedom of expression.

As was stated in *Near v. Minnesota*, 283 U.S. 697, with regard to the imposition of a "prior restraint" on the freedom of expression:

"... the protection even as to previous restraint is not absolutely unlimited."

But in *Batam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that:

"any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity ..."

In *Speiser v. Randall*, 357 U.S. 513 (1958), it was stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated ... is finally drawn. The separation of legitimate from illegitimate speech calls for ... sensitive tools ..."

The "sensitive tools" referred to in *Speiser, supra*, have been determined by this Court to mean that in the protected area of freedom of expression the administrative officials and/or law enforcement officials may impose a prior restraint or temporary suppression only if they design and comply with procedural safeguards which obviate the dangers inherent in a censorship system. The procedural safeguards must be patterned in such a manner as to assure that the burden of promptly instituting adversary judicial proceedings and the burden of showing the expression is unprotected rest upon those seeking to restrain or suppress the expression and to also assure for a prompt final judicial decision on the merits within the shortest fixed period compatible with sound judicial determination.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held the administrative procedural scheme of the Maryland Motion-picture censorship statute constituted an invalid "prior restraint" and violated the constitutional guarantee of freedom of expression because:

"First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide

adequate safeguards against undue inhibition of protected expression, and this renders the Section 2 requirement of prior submission of films to the Board an invalid previous restraint."

The reasoning underlying the necessity for a prior adversary judicial proceeding was held to be:

"The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, *supra*; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L ed 2d 809, 84 S Ct 1723; *Marcus v. Search Warrant*, *supra*; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 8 L ed 2d 639, 663, 664, 82 S Ct 1432."

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), this Court expressly condemned the seizure of allegedly obscene publications as an invalid "prior restraint" by stating:

"there is no doubt that an effective restraint indeed the most effective restraint possible was imposed prior to the hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the news stands and the premises of the wholesale distributor . . . the public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to out-wit the police by obtaining and selling other copies before they in turn could be seized . . . a distributor may have every reason to believe that a publication is constitutionally protected and will be so held after a judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes from him . . . mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

In a recent pronouncement by this Court involving *First Amendment* rights and "prior restraint," *Carroll v. President and Commissioners of Princess Anne, et al*, 21 L ed. 2d 325 (1968), Justice Fortas, expressing the views of eight (8) members of the Court, set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

"It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

...

"Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.

"Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceedings, cannot be sustained. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 6 L Ed 2d 1127, 1135, 81 S Ct 1708 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L Ed 2d 809, 84 S Ct 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for 'not first affording (the seller of the books) an *adversary hearing*' (emphasis supplied) 378 U.S. at 211, 12 L Ed 2d at 813."

...

"...there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

...

"In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication."

It was in the case styled, *Marcus v. Search Warrant*, *supra*, that this Court enunciated the principle that:

"... (U)nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech."

By analogy, it appears equally clear that the Federal Government may not impose similar procedures that violate the constitutional guarantee of freedom of expression and the constitutional right to use the mail by virtue of the Due Process Clause of the *Fifth Amendment* of the *Constitution of the United States*. See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519; *Lamont v. Postmaster General*, 381 U.S. 301.

While this Court, in *Manual Enterprises*, *supra*, was dealing, *inter alia*, with the issue of whether or not Congress had expressly authorized the Postmaster General, under 18 U.S.C. Section 1461, to close the mails to matter, which in

his sole discretion, fell within the prohibition of that section, it is the particular language employed by Mr. Justice Brennan, joined by former Chief Justice Warren and Mr. Justice Douglas, that appears highly relevant to the case at bar:

"I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts. However, it is enough to dispose of this case that Congress has not, in Section 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of that section. 'The provisions... would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.' *Hannegan v. Esquire, Inc.*, 327 U.S. at 156, 90 L. ed. 586, 66 S. Ct. 456."

Like Section 1461, the history of Sections 4006 and 4007 does not clearly reveal that Congress explicitly granted the authorization for the Postmaster General to determine, in his sole discretion, the obscenity of the material, impose a mail block as a result of this finding, forbid the honoring of money orders and ordering the return to the sender of the mail items.

In *Manual Enterprises, supra*, it is significant to note that it was said at pages 512-513:

"In 1950, Section 4006 was enacted granting special powers over the mail of any person found, to the

Postmaster General's satisfaction, to be using the mails to obtain money for or to be providing information about any obscene or vile article or thing: Postmasters could mark mail sent to that person 'unlawful' and return it to its sender; and they could forbid payment to that person of any money orders or postal notes, and return the funds to the senders. *The clarity of the grant of these powers is no less noteworthy than their subsequent history.* In 1956 the Postmaster General sought and obtained the power to enter an order, pending the administrative proceeding to determine whether Section 4006 should be invoked, under which all mail addressed to the respondent could be impounded. The order was to expire at the end of 20 days unless the Postmaster General sought, in a Federal District Court, an order continuing the impounding. The 20-day order by the Postmaster General, and its extension by a court, were to issue only if 'necessary to the effective enforcement of (Section 4006).' In 1959, extensive hearings were held in the House on the Post Office's request that the 20-day period be extended to 45 days, and that the standard of necessity be changed to 'public interest.' Instead, what was enacted in 1960 stripped the Postmaster General of his power to issue an interim order for any period, and directed him to seek a temporary restraining order in a Federal District Court." (emphasis supplied).

Assuming, arguendo, that the Postmaster General was expressly authorized by Congress under *Sections 4006 and 4007* to impose such restraints and secure a temporary restraining order and a preliminary injunction in Federal District Court, still there would remain grave constitutional doubts as to the validity of such a procedure which does not provide for all the fundamental safeguards that this Court has consistently stated is required in the sensitive area of freedom of expression. The imposition of the restraints in the instant case by the Postmaster General, prior to a judicially

superintended adversary proceeding, must be interpreted, in the light of this Court's rulings, to be invalid. These invalid "prior restraints" have had a "chilling effect" upon the Appellee's unfettered exercise of his freedom of expression as well as his "open right" to use of the mails, thereby inducing self-censorship.

CONCLUSION

In summary, Appellee has, on the basis of the applicable statutes and cases cited and represented to the Court in the premises, summarized the existing law on the issues before the Court. This, together with the actions of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control, in seeking to suppress from the public material presumptively protected under the *First Amendment* to the *Constitution of the United States* and conjunctively to establish a mail block restricting the right of Appellee to the use of the mails in receipt and delivery of mail and postal money orders, has effectively established an unlawful "prior restraint" creating a "chilling effect" upon and a denial of Appellee's freedoms guaranteed by virtue of the *First Amendment* to the federal *Constitution*, all of which may occur without a prior judicially superintended adversary hearing.

Sections 4006 and 4007 of Title 39 are repugnant to the provisions of the *First Amendment* in that they permit the Postmaster General and those acting under his authority and control to act as a censor by permitting an unlawful mail block and thereby denying Appellee those freedoms guaranteed by the *First Amendment* to the *Constitution of the United States*. And further, that there are no standards or guidelines to restrict the administrative officials in their action and therefore sweep within their purview presumptively

protected *First Amendment* material of Appellee's. As cited herein, *Section 4007* is further void as ancillary to *Section 4006* in that it creates an unconstitutional exemption denying Appellee the equal protection as well as application of the laws. This is all the more critical in the exercise of Appellee's *First Amendment* freedoms.

Mr. Justice Stewart stated in his concurring opinion in *Ginsberg v. New York*, 390 U.S. 629:

"The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose."

Appellee therefore requests this Court to dismiss this appeal from the United States District Court for the Northern District of Georgia or in the alternative affirm that Court's judgment.

Respectfully submitted,

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February, 1970.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 55

**ANTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES, AND EVERETT T. CARPENTER, POST-
MASTER OF THE CITY OF LOS ANGELES, STATE OF
CALIFORNIA, APPELLANTS**

v.

TONY RIZZI, D/B/A THE MAIL BOX

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

No. 58

**UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL, APPELLANTS**

v.

THE BOOK BIN

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA**

BRIEF FOR APPELLANTS

OPINIONS BELOW

**The memorandum opinion of the United States Dis-
trict Court for the Central District of California**

(App. 21) in No. 55 (*The Mail Box*) is reported at 306 F. Supp. 634.

The opinion of the United States District Court for the Northern District of Georgia (App. 96) in No. 58 (*The Book Bin*) is reported at 306 F. Supp. 1023.

JURISDICTION

The judgment of the three-judge district court in *The Mail Box*, declaring 39 U.S.C. 4006 unconstitutional and enjoining the Postmaster General and the Postmaster of Los Angeles from enforcing an order thereunder, was entered on August 1, 1969 (App. 41). A notice of appeal was filed on Tuesday, September 2, 1969, Monday, September 1 having been Labor Day.

The judgment of the three-judge district court in *The Book Bin*, dismissing the action brought by the United States for an order pursuant to 39 U.S.C. 4007, enjoining the Postmaster General from conducting proceedings pursuant to 39 U.S.C. 4006, and declaring 39 U.S.C. 4006 and 4007 unconstitutional, was entered on October 16, 1969 (App. 106). A notice of appeal was filed that day.

The jurisdiction of this Court over both appeals is conferred by 28 U.S.C. 1252 and 1253. *Zemel v. Rusk*, 381 U.S. 1.

On March 2, 1970, the Court noted probable jurisdiction in both cases and set them for consecutive argument (397 U.S. 959, 960).

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Central District of California

STATUTES INVOLVED

39 U.S.C. § 4006 provides as follows:

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.

39 U.S.C. § 4007 provides as follows:

(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incom-

ing mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. 4006 is unconstitutional on its face.
2. Whether 39 U.S.C. 4007 is unconstitutional when invoked in aid of proceedings for the enforcement of 39 U.S.C. 4006.

STATEMENT

The Mail Box and The Book Bin are retail distributors of magazines which use the United States mails to advertise their magazines, to receive orders and payment for them, and to distribute them. The General Counsel of the Post Office Department concluded that certain of these magazines—picture magazines consisting entirely or almost entirely of photographs of women exposing their genitalia—are obscene. He therefore sought to invoke the remedies of 39 U.S.C. 4006 and 4007 to halt further use of the mails and of postal money orders for commerce in these magazines.

A. THE STATUTORY BACKGROUND

1. SECTION 4006

Section 4006 was enacted in 1950, in response to the substantial increase in the flow of lewd and obscene materials through the mails which the United States had experienced since World War II. S. Rep. No. 2179, 81st Cong., 2d Sess. (1950). The section was modelled on 39 U.S.C. 4005, an anti-fraud statute which had been in force since 1890, and whose constitutionality had repeatedly been upheld. *Id.* at 3; 26 Stat. 466; *Public Clearing House v. Coyne*, 194 U.S. 497; *Donaldson v. Read Magazine*, 333 U.S. 178.

Section 4005, as amended (82 Stat. 1153), grants the Postmaster General authority to stamp appropriately and return to the sender any mail sent to the perpetrator of what he finds to be a scheme for obtaining money by means of false representations, in connection with that scheme. The Postmaster General may also refuse to cash postal money orders drawn to the actor in connection with his scheme.

Section 4006 grants identical authority with respect to mail and postal money orders addressed to persons the Postmaster General finds to have been using the mails for the advertisement, sale and distribution of "obscene" matter. That is, it permits him to stamp as "unlawful" and return to the senders letters addressed to any person, and to prohibit the payment of postal money orders to that person, if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene, lewd, lascivious, indecent, filthy, or vile article, matter,

thing, device or substance" or is using the mail to distribute information about how such items may be obtained.

Proceedings under both Section 4005 and Section 4006 are governed by a single set of departmental regulations, which comply with the Administrative Procedure Act. Under them, a proceeding is begun with a written complaint and notice of hearing initiated by the General Counsel of the Post Office Department. 39 C.F.R. §§ 952.5, 952.7, 952.8. There is a trial-type hearing before an impartial hearing examiner, who renders a full opinion, including findings of fact, conclusions of law and a statement of reasons. 39 C.F.R. §§ 952.9-952.25; see also 39 U.S.C. 308a; 39 C.F.R. § 821.3(c)(1). The constitutional definition of obscenity is applied in these proceedings.¹ Provision is made for a full and precise record. 39 C.F.R. 952.18-952.22. The decision is to "be rendered with all due speed," 39 C.F.R. § 952.24(a), and there is an administrative appeal. 39 C.F.R. § 952.25. An order does not take effect until the administrative proceeding has been completed, but the Postmaster General is not required to seek judicial enforcement. 39 C.F.R. § 952.28.

Where a Section 4006 (or 4005) order is entered, it applies only to mail and postal money orders directly related to the unlawful (fraudulent) activity. Mail

¹ See, for example, the opinion of the Department's judicial officer in the Section 4006 administrative proceeding involving *The Mail Box*, set out in the Appendix to this Brief at pp. 44-63 *infra*.

which appears from its cover to be unrelated to that activity, such as second class publications and utility bills, is immediately delivered. Because the privacy of first class mail is guaranteed, 39 U.S.C. 4057, 39 C.F.R. 117, *United States v. Van Leeuwen*, 397 U.S. 249, other mail cannot be opened by postal officials to determine its contents. Therefore, such mail as, from its appearance, might be related to the unlawful activity is held at the postal station for at least 24 hours after its arrival. During this time it may be opened and inspected by the addressee or his agent. Mail containing matter found unrelated to the unlawful activities is then delivered; mail not thus inspected, or which is found upon inspection to be related to the unlawful activity, is stamped "unlawful" and returned to the sender."

*The order initially entered against The Mail Box in the administrative proceedings against it, App., *infra*, pp. 63-66, seemed to require "unlawful" treatment for all mail containing payments for its publications or requesting that those publications be sent, whether or not the publications sought were among those which had been adjudicated obscene. Such a broad order would be counter to Post Office policy, which is to limit Section 4006 orders to adjudicated publications, to transmit requests for other publications and to cash postal money orders in payment for other publications. This policy is shown, *inter alia*, by the limited orders secured from the district court in the Section 4007 proceedings for interim relief against The Mail Box; those orders do specify the particular magazines as to which mail is not to be transmitted, and permit transmittal of all other mail. App., *infra*, pp. 41-44. Since the Postmaster to whom the Section 4006 administrative order was sent was the same as had previously been administering the district court's order granting interim relief, the Section 4006 order in practice would have been understood as embodying the same limitations. To eliminate any doubt as to its in-

2. SECTION 4007

Experience proved, however, that such administrative orders were often inadequate. The bulk of mail activity in a pornography distribution scheme often occurs, and its profits are often reaped, within a short time after the scheme is launched. S. Rep. No. 1818, 86th Cong., 2d Sess. (1960). Despite the emphasis on expedition in the administrative regulations, *e.g.*, 39 C.F.R. 952.7, 952.13, 952.24(a), the proceedings can take so long that distribution is essentially complete by the time an administrative order can be entered. Accordingly, in 1956, Congress authorized the Postmaster General to detain a sender's mail for periods of up to twenty days, pending the outcome of Section 4006 proceedings against him; upon application to a district court within the twenty-day period and upon a showing that continued detention of mail was both "reasonable and necessary" to enforcement of Section 4006 (then 39 U.S.C. (1958 ed.) 259a), the period of mail detention could be extended for the pendency of the proceedings. 70 Stat. 699. See *Toberoff v. Summerfield*, 245 F. 2d 360 (C.A. 9); 256 F. 2d 91 (C.A. 9).

Section 4007 in its present form was enacted in 1960, when Congress concluded that the twenty-day period, even with the opportunity for judicial extension, was too short in relation to the length of the administrative proceedings; and that the question of

tended scope, however, the Section 4006 order has since been modified by the Post Office to make these limitations explicit on its face. App., *infra*, pp. 67-71. Compare *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 183-184.

preliminary restraint should be entirely in judicial hands. Accordingly, Section 4007 (1) withdraws from postal officials all powers of temporary mail detention; (2) permits district courts to order such detention pending completion of administrative proceedings and any appeal, upon a showing of probable cause to believe that Section 4005 or 4006 is being violated; (3) requires the district court proceedings to meet the procedures and standards employed for the issuance of temporary retaining orders and preliminary injunctions under Rule 65 of the Federal Rules of Civil Procedure; (4) authorizes the district court to provide in its order that the detained mail "be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity"; and (5) provides that the action of the court "does not affect or determine any fact at issue in the statutory proceedings." The respondent continues to receive his mail while proceedings under either Section 4006 or Section 4005 are in progress unless application is made for, and the court issues, an order under Section 4007.

B. THE PROCEEDINGS BELOW

In *The Mail Box*, the Postmaster General successfully moved for a temporary detention order under Section 4007 in the United States District Court or the Central District of California regarding mail orders for certain appellee's magazines; a temporary restraining order was granted on December 3, 1968, and a preliminary injunction on December 26, 1968. (App. *infra*, pp. 41-44.) Administrative proceedings

under Section 4006 were begun at the same time. On December 31, 1968, following an administrative hearing, the Judicial Officer of the Department found that the specified magazines—all of the character previously stated—were obscene; the finding was based upon a detailed analysis of the three independent elements of obscenity necessary to command a majority of this Court. See the Appendix, *infra*, at pp. 49-61. An appropriate order was then entered, *id.* at 63-66; see n. 2 *supra*, and appellee sued to enjoin its enforcement. A three-judge district court was convened and, in a brief *per curiam* opinion, found the statute unconstitutional on its face solely “because it fails to meet the requirements of *Freedman v. Maryland* (1965), 380 U.S. 51” — presumably in that “[t]he burden of seeking judicial review of the Postmaster General’s decision is placed on the person against whom the mail block has been imposed” (J.S. 16). Enforcement of Section 4006 was enjoined.

In *The Book Bin*, appellee counterclaimed to the Postmaster General’s action to obtain a Section 4007 order,¹ filed in the United States District Court for the Northern District of Georgia, by asserting that both that section and Section 4006 are unconstitutional and requesting injunctive relief against their enforcement. A three judge district court was convened—in this case, before any administrative proceedings could be completed—and held both sections unconstitutional (App. 21). Regarding Section 4007,

¹ The order was sought with respect to a single issue of one of appellee’s magazines, which, again, was of the character described above.

the court concluded that the finding merely of "probable cause" to believe an item was obscene could not justify even a temporary mail detention order; and that, in any event, under *Lamont v. Postmaster General*, 381 U.S. 301, the scope of the mail detention order is too broad and the burden on the addressees to secure delivery of mail unconnected with the unlawful activity, too great. It agreed with the district court in *The Mail Box* that the procedures of Section 4006 do not meet the requirements of the *Freedman* case.

SUMMARY OF ARGUMENT

I

The postal power conferred on Congress by the Constitution gives it full authority, short of restrictions imposed by the First Amendment, to deny the use of mails to commercial traffic in obscenity. See *United States v. Hiatt*, 415 F.2d 664 (C.A. 5), certiorari denied, 397 U.S. 936. Indeed, this Court has upheld against sweeping First Amendment attack a statute parallel to that at issue here, regulating the use of the mails for transmission of fraudulent and lottery matter. 39 U.S.C. (Supp. V) 4005; *Donaldson v. Read Magazine*, 333 U.S. 178. It found not "the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." 333 U.S. at 191. Similarly, the First Amendment does not confer complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography.

Stanley v. Georgia, 394 U.S. 557, requires no different conclusion. *Stanley* does not protect commercial activity, even where it occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. That opinion protects privacy, and in particular the privacy of ideas; it does not follow that an individual has any "right to receive" obscene materials, which by this Court's definition embody no redeeming advocacy of ideas. A commercial pornographer is no more entitled by *Stanley* to receive his mail unimpeded than he would be to protect himself from otherwise lawful searches and seizures of his place of business by using his home for that purpose.

II

Like the fraud statute upheld in *Donaldson*, *supra*, Section 4006 meets all necessary constitutional standards. First, it is entirely different from the motion picture censorship statute involved in *Freedman v. Maryland*, 380 U.S. 51. Section 4006 embodies no requirement that materials must be submitted for approval before they can be published; the burden is entirely upon the government to act, and to prove that materials are objectionable before their distribution can be interfered with. Under Section 4006, administrative proceedings take place before an impartial judicial officer, not a censorial board, and in full compliance with the ordinary rules of administrative due process. The administrative order does not go into effect until a conclusion is reached that the challenged material is in fact obscene; and, as we view the statute,

if an appeal is taken, mail subject to the order may be impounded, but may not be returned to the sender pending resolution of that appeal. Indeed, a still more restrictive interpretation is possible if the above does not suffice to defeat the constitutional challenge to the statute: the administrative order could be denied any effect whatever, if an appeal were taken, until the completion of review. In these circumstances it is impossible to say that the slight burden on the publisher to initiate the review process works any deprivation of his constitutional rights. Cf. *Interstate Circuit v. Dallas*, 390 U.S. 676, 690, n. 22.

Second, a Section 4006 order is not invalid under *Lamont v. Postmaster General*, 381 U.S. 301. The inspection procedure for which it provides is necessary, in view of the guaranteed privacy of first class mail from *in camera* postal inspection; the statute thus provides as narrow a remedy as the situation permits. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503. That remedy was upheld in *Donaldson, supra*, where this Court noted that the scope of orders can frequently be tailored to the circumstances of a particular case in such a way as to minimize its possible adverse effect upon the publisher's legitimate postal business. Unlike the situation in *Lamont*, the mailer here is not an innocent party whom Congress presumed to protect by imposing a disagreeable and unconstitutional burden of action. He is the very person whose mailing activities (which, it must be stressed, are found to be of a nature forbidden altogether) have given rise to the proceedings; and he has the benefit

of adversary administrative proceedings in which the government has the burden of going forward and of proof.

Since Section 4006, like a criminal statute, applies only after publication has occurred, it has no impermissible chilling effects. Like a criminal statute, it is intended to induce self-censorship in those disposed to violate it; but so long as the activating circumstances are described with sufficient precision—as they are—there can be no more objection to this effect than there is in the case of a criminal statute. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442.

III

The preliminary relief permitted by Section 4007 also meets all necessary constitutional standards. This section permits interim relief, in both obscenity and fraud-lottery cases, only under those circumstances where such relief would be justified under Fed. R. Civ. P. 65. This means that, to secure such relief in a Section 4006 case, the Post Office must show in an adversary hearing both that there is probable cause to believe that the materials at issue are obscene, and that emergency relief is essential if the public policy of the statute is not to be defeated.

Since such relief could be sought only if the government had sufficient information with which to give notice of the proceedings, a motion for Section 4007 relief could never be *ex parte*. Moreover, under this Court's cases, any finding of probable cause could

be made only after judicial inspection of the materials themselves. Given this Court's present approach to the issue of obscenity, *Redrup v. New York*, 386 U.S. 767, it would be the rare case in which a court could conclude that there was probable cause to believe materials to be obscene which were not of that character.

Moreover, the clear implication of Section 4007's legislative history is that that section is to be invoked only where emergency relief is truly needed—where the major part of the distribution will occur before administrative proceedings can be concluded (effectively defeating any orders that may eventually be entered) and which involve enterprises of substantial size. Under Rule 65, the court is permitted to weigh against the government's interest the inconvenience and harm to the respondent. Indeed, if the administrative proceedings are delayed, that in itself would warrant modification or remission of a Section 4007 order.

In short, while Section 4007 speaks of probable cause, in practice judicial scrutiny will go much beyond that; the proceeding takes place in the expeditious but scrupulous framework of Rule 65; and the traditional flexibility of courts of equity is available to balance conveniences, mitigate hardships and frame appropriately limited orders, subject to modification with changing conditions, and to appellate review if that need be.

ARGUMENT

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY, BY AN APPROPRIATELY LIMITED STATUTE, TO DENY THE USE OF THE MAILS TO COMMERCIAL TRAFFICKERS IN PORNOGRAPHY FOR THE RECEIPT OF PAYMENTS AND ORDERS FOR OBSCENE MATERIALS

Congress' constitutional power to "Establish Post Offices and post roads" and to "regulate Commerce with foreign Nations, and among the several States," Art. I, Section 8, includes full power to deny the use of the mails to commercial traffic in obscenity. Short of restrictions imposed by the First Amendment, its right to prohibit the carriage of unlawful or dangerous items, or the carrying on of an unlawful business through the mails is not open to doubt. *United States v. Hiatt*, 415 F. 2d 664, 666-669 (C.A. 5), certiorari denied, 397 U.S. 936. Some items are prohibited because of their inherent dangerousness, including danger to the carriage of the mails themselves, *e.g.*, 18 U.S.C. 1716; others, because of the unlawfulness of the transmission, and a desire to protect the postal service from involvement, however innocent, in such sendings. 18 U.S.C. 1302, 1341, 1717, 1718; 39 U.S.C. 4001. The Post Office Department is not only a common carrier, but also an instrumentality of government. As such, it is peculiarly affected with a public interest; within the limits imposed by the Bill of Rights, and especially the First Amendment, it is important and proper to protect that interest from involvement, even unknowing, with crime.

These propositions were reaffirmed in a case involving a statute parallel to the obscenity statute at issue

here, but in that case regulating the use of the mails for transmission of fraudulent and lottery matter. Federal criminal statutes make it an offense to use the mails in connection with a lottery or a fraudulent scheme. 18 U.S.C. 1302, 1341. When the Postmaster General is persuaded that a person is using the mails for such a scheme, however, he may also invoke the civil remedy of 39 U.S.C. (Supp. V) 4005, permitting the return to their senders of letters addressed to that person or his representative, with the letters appropriately stamped to indicate the reason for their return. In 1945, he invoked that remedy against Facts Magazine and others on account of an allegedly fraudulent "puzzle contest" appearing in that magazine, and this Court upheld him. *Donaldson v. Read Magazine*, 333 U.S. 178.

Although the publishers of Facts Magazine mounted a broadscale constitutional attack on Section 4005 and its application to them—including, *inter alia*, First Amendment claims, 333 U.S. at 189, 191—the Court found the government's power to protect its citizens against use of the mails to perpetrate fraud to be firmly established, and sufficient to support the statute. The Court appears to have accepted the publishers' contention, as we do here, that Congress' power of regulation over postal matters, as over commerce and tax, is limited by the strictures of the Bill of Rights; but those limitations do not "provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to

use the mails for perpetration of swindling schemes," 333 U.S. at 191; and see *Hiatt, supra*, 415 F. 2d at 667.

Similarly, we believe the First Amendment does not confer on individuals complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography. As in the case of fraud, such use may be prohibited by criminal statute. Compare 18 U.S.C. 1341 with 18 U.S.C. 1461; *Parr v. United States*, 363 U.S. 370, with *Roth v. United States*, 354 U.S. 476. And assuming—as in the case of fraud—that requisite constitutional limitations are honored, the use may also be regulated by civil means. Since civil interdiction of mail to a person engaged in fraud meets the constitutional tests, it would appear that civil interdiction of mail to a commercial salesman of obscenity would do so as well. See *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441.

It may be argued, however, that this Court's recent decision in *Stanley v. Georgia*, 394 U.S. 557, requires an opposite conclusion. Although the opinion in that case limited itself in terms to a holding that the state has no power to make criminal the mere possession of obscene literature in a private home, and expressly disavowed any intent to limit the *Roth* doctrine, 394 U.S. at 565, 568, some lower courts have read it as protecting commercial activity, particularly where that activity occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. See, e.g., *Byrne v. Karalaxis*, set for reargument, No. 83, this Term; *United States v. Thirty-Seven Photographs*, pending on jurisdictional statement, No. 133, this Term. If *Stanley* does

protect such activity, then it might appear that use of the mails—inherently private and, in the case of a mailed order blank, ordinarily consensual⁴—is indeed protected from government regulation. On that reasoning, only the uninvited advertisement or mailing of obscene matter to a minor could be made an offense, and *Roth* would have been not only limited but overruled.

We believe *Stanley* has no such reach. As we explain at greater length in our brief *Amicus Curiae* in *Byrne v. Karalexis, supra*, pp. 6–17, *Stanley*'s disclaimer of any purpose to modify *Roth* in its application to the commercial distribution of pornography can and should be honored. *Stanley* recognized that, for important and compelling reasons, the state has no right to intrude into a private home in search of obscenity. That the owner of those places has a constitutional right against intrusion into them does not mean, however, that he has a First Amendment right, as such, to have everything which might otherwise be found there. The First Amendment protects materials otherwise obscene in such circumstances because of the risks to privacy, to protected speech and thought, which would be presented by a governmental search. It does not follow that an individual has a "right to receive" obscene materials. It therefore cannot be argued, we submit, that there is any First Amendment right to disseminate such materials.

Nor do we think the use of the mails in this kind of case can fairly be analogized to the use of a home

⁴It is possible that, for a prank or to create distress, an order would be placed in another's name.

or office as a private sanctuary from state inquiry. It is true that, like the home, first class mail is protected from unreasonable searches and seizures. 39 U.S.C. 4057; cf. *United States v. Van Leeuwen*, 397 U.S. 249. Accordingly, it is possible that consensual, non-commercial correspondence sent through the mails would be found to enjoy immunity under *Stanley* from seizure or use as the basis for prosecution; as this Court knows, the government's policy is not to prosecute such cases. *Redmond v. United States*, 384 U.S. 264; and see the Memorandum for the United States therein, No. 1056, O.T. 1965, pp. 3-4. But here, the mails are being used for a commercial purpose, and that degree of concern for the privacy of ideas is no longer appropriate. Just as a home used as a place of business by a dealer in pornography would not be immune from search under *Stanley*, use of the mails for commercial purposes in connection with dealings in obscenity is subject to regulation without any offense to the *Stanley* holding.

II. SECTION 4006, LIKE THE FRAUD STATUTE UPHELD IN *DONALDSON V. READ MAGAZINE*, 333 U.S. 178, MEETS ALL NECESSARY CONSTITUTIONAL STANDARDS.

A. SECTION 4006 MEETS THE STANDARDS REQUIRED BY *FREEDMAN V. MARYLAND*, 380 U.S. 51.

1. The principal holding in the courts below was that Section 4006 fails to provide adequately for a prompt judicial resolution of the question of obscenity, and thus does not meet the standard for civil obscenity proceedings set by this Court in *Freedman v. Maryland*, 380 U.S. 51. *Freedman* involved a movie censorship scheme which forbade the exhibition of any

moving picture in the state until it had been submitted to, and approved by, a state board of censors. The scheme made no special provision for expedition in resolving this issue before the board; if it denied a license, that effectively barred the film from exhibition; and there was no assurance of prompt judicial review. These circumstances led the Court to conclude the Maryland statute was unconstitutional. By placing the burden of action on the exhibitor throughout, it created the risk that the decision of a body whose "business is to censor," *id.* at 57, might become final; by requiring exhibitors to invoke "unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression," *Shuttlesworth v. Birmingham*, 394 U.S. 147, 162 (Harlan, J., concurring), the statute created real risks that protected speech would be foregone. 380 U.S. at 59. The nub of the opinion, then, was the length of time during which publication or exhibition would be forbidden pending the completion of administrative and judicial review; if not adequately controlled, the Court held, the mere prospect of delay before publication could be permitted was sufficient to impair First Amendment rights. 380 U.S. at 58-61; *Domrowski v. Pfister*, 380 U.S. 479, 489; *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-142.

On all of these matters, the procedures under Section 4006 differ substantially from those invalidated in *Freedman*.⁸

⁸Section 4006 itself is silent on the procedures by which the character of the offending material is to be determined. The statute was not, however, drafted as a matter of legislative first impression. Its language was taken, with minor changes

First, there is no issue of prior censorship or restraint of publication; the Post Office is not placed in the position of overseeing the general flow of the mail. The publishers here began to sell the issues involved as soon as they had produced them, and without any need to submit them to the Post Office for clearance. When questionable publications come to the Post Office's attention, the burden is on it to initiate administrative proceedings and—unless it can persuade a district court to grant temporary relief under Section 4007, discussed *infra*—the publisher continues to receive requests for his materials and payments for them unimpeded throughout the pendency of the administrative proceedings. Those proceedings are held before an impartial judicial officer or hearing examiner,* not a body selected for its interest in excising

in phraseology, from statutes first enacted nearly a century ago to prevent the use of the mails for the perpetration of frauds, the promotion of lotteries and the conduct of unlawful businesses under fictitious names. Act of June 8, 1872, ch. 335, § 300, 17 Stat. 322; Act of March 2, 1889, ch. 393, § 3, 25 Stat. 873 (now 39 U.S.C. 4003, 4005). Although phrased in language seeming to give the Postmaster General wide discretion in determining how to carry out his statutory power, these acts have been implemented historically by procedures embodying contemporary conceptions of fairness and procedural due process. *Plapao Laboratories, Inc. v. Farley*, 92 F. 2d 228 (C.A. D.C.); *New v. Tribond Sales Corp.*, 19 F. 2d 671 (C.A. D.C.) The Administrative Procedure Act, moreover, applies to proceedings conducted pursuant to these statutes. 5 U.S.C. (Supp. V) 559; *Cates v. Haderlein*, 342 U.S. 804, reversing *per curiam*, 189 F. 9d 369 (C.A. 7); *Door v. Donaldson*, 195 F. 2d 764 (C.A. D.C.); *Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33.

*The judicial officer and hearing examiners have a number of other duties in addition to obscenity matters. 39 C.F.R. 821.3(c); 1969 Annual Report of the Postmaster General 296.

controversy from communication, in full accordance with the requirements of administrative due process. The officer must be persuaded that the matter in question is affirmatively obscene, under this Court's standards, before any administrative action can be taken, see *Kirby v. Shaw*, 358 F.2d 446 (C.A. 9); the applicable regulations require him to produce a record that is full and precise, 39 C.F.R. 952.18-952.22, and an exposition of his reasoning as full as would result from a trial in district court. 39 C.F.R. 952.24.

In the absence of the spectre of censorship, *Freedman* does not preclude the initial determination of obscenity from being made by an administrative official.¹ While *Freedman* spoke very broadly of the

¹To forbid such determinations would raise grave doubts about the administrative process in many areas. It might, for example, disqualify the Federal Communications Commission from making determinations involving First Amendment rights in broadcasting, and the National Labor Relations Board in picketing. There is no evidence that administrative agencies in general are not competent to decide such questions, at least in the first instance. The opinion of the Judicial Officer in the *Book Bin* case (App., *infra*, pp. 44-61) displays considerable sensitivity to questions of freedom of expression. It is significant that of the four cases cited in *Freedman* as teaching the need for judicial action only one, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, involved an adversary administrative proceeding, and in that case there was no opinion for the Court. Two others, *A Quantity of Books v. Kansas*, 378 U.S. 205, and *Marcus v. Search Warrant*, 367 U.S. 717, involved the seizure of allegedly obscene books on the authority of warrants issued *ex parte* by state court judges. In the remaining case the vice of the state scheme was that no proceeding of any kind was involved. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58. Taken together these authorities go further to establish the proposition that an adversary hearing is required than that the hearing in the first instance must be before a judge.

need for a prompt judicial determination of the issue of obscenity as an integral part of any non-criminal scheme of limitation on expression, that language appeared in response to a situation where the alternative to a judicial determination was not a quasi-judicial adversary proceeding, but unilateral administrative action—in which the full weight of administrative inertia lay against the private party. Only after the *Freedman* board had made its decision, *ex parte*, could there be any sort of formal proceeding, and in that proceeding the exhibitor carried the full burden of action and persuasion.

It is true that, in the absence of an attempt to obtain judicial review, a Section 4006 order may take effect immediately, so that the burden of seeking review is on the person subject to the order. While the existence of the order and the corresponding interference with mail sales undoubtedly hinder his publication, however, the order—again unlike *Freedman*—does not foreclose publication. He remains free to sell by other means. Indeed, if judicial review is sought, we believe that the necessary implication of the statutory scheme is that those sales are merely postponed, not foreclosed, pending judicial resolution of the case.

Thus, if the Department had been able to obtain interim judicial relief under Section 4007, that would have provided only for the impounding of incoming remittances and purchase orders, and not for their return as “unlawful”, during the pendency of the administrative proceedings “and any appeal therefrom”; if the publisher prevailed in such proceedings,

he would then be entitled to receive that mail. Where such relief is not obtained, but an appeal is taken from an administrative order under Section 4006, that order cannot have any greater effect. At most, during the pendency of an appeal, it would authorize the impounding of incoming matter on the same terms as would a judicial order under Section 4007. Cf. *Donaldson v. Read Magazine, supra*, 333 U.S. at 186. While inconvenient to a publisher who ultimately prevails on appeal, such an interim effect would be fully justified by administrative findings of obscenity in proceedings of the type described, and does not approach the effect of the procedures found improper in *Freedman and Teitel Film*.

In particular, the procedures under this statute provide an incentive, not a disincentive, to seeking review, and thus avoid this Court's concern in *Freedman* that the effect of the procedures there might be to discourage review and leave the matter in the hands of a censor. Since an appeal will preserve the mail involved for possible future delivery, any publisher believing his publication to be protected would have a strong motive for appealing. Correspondingly, delay here is a much less pressing element. While his remitters might become discouraged after a time of no response, a publisher could explain the reason for delay to them if he ultimately prevailed, and thus retain their business. And, since a *national* statute is at issue, only one proceeding will be required to clear the publication for distribution. In these circumstances, the publisher's burden on initiating judicial review is not so

serious as to condemn the statute under the First Amendment.

Finally, Section 4006 is not invalid under *Freedman* because the publisher must carry a burden of persuasion on judicial review. While review would be on the administrative record, that record must be full and precise. 39 C.F.R. 952.18-952.22. The reviewing court would have the same freedom and responsibility as this Court traditionally exercises in obscenity cases to review for itself the materials in question and to determine whether they are obscene. *E.g.*, *Redrup v. New York*, 386 U.S. 767; *Jacobellis v. Ohio*, 378 U.S. 184. The legal question is no different than would obtain if the Post Office were seeking enforcement of its order; although the publisher initiates the appeal, the court must conclude that the material is obscene before it can enforce the Department's order. In this circumstance, it is improper to say that any burden of persuasion has been placed on the publisher. Cf. *Interstate Circuit v. Dallas*, 390 U.S. 676, 690, n. 22.

2. Although we believe this analysis suffices to demonstrate the constitutionality of the statute under *Freedman*, especially in view of the absence of elements of licensing or censorship, see *Kingsley Books, supra*, 354 U.S. at 441, the Court might conclude that questions remain regarding the fact and timing of judicial involvement in its enforcement. If so, a further limiting construction might be adopted which would meet these doubts and thus avoid invalidating the entire scheme. That construction would treat an appeal from a Section 4006 administrative order as staying it in its entirety until resolution of the ap-

peal; in the interim, unless there was a judicial order for temporary detention of mail under Section 4007, the publisher would receive his mail unimpeded.

The key to this alternative construction is the judicial order under Section 4007, the validity of which is separately discussed *infra* at pp. 33-38. While one might believe that denying all effect to the administrative order pending appeal would substantially undercut the statute by permitting publishers to collect their profits during the first few profitable weeks of a press run, see S. Rep. No. 1818, 86th Cong., 2d Sess. (1960) 2, the availability of interim judicial relief answers that objection where success in judicial proceedings is likely; where success is not likely, the objection has little force. Indeed, in enacting what is now Section 4007 in 1960, the Congress considered but rejected a request by the Postmaster General to make clear that appeal proceedings would *not* operate as a stay of a Section 4006 order in cases where interim judicial intervention under Section 4007 either had not been sought or had been denied. S. Rep. No. 1818, *supra*, at 5. Section 4007 authorizes an order of temporary detention to be in effect "pending the conclusion of the statutory proceedings *and any appeal therefrom*" (emphasis supplied). On the floor of the Senate, its sponsor stressed that "The bill places the responsibility for the detention of mail upon the courts instead of on an appointive officer," 106 Cong. Rec. 15428 (1960), and expressed a general desire to create a statutory procedure which would meet constitutional requirements while permitting effective regulation of use of the mails for commercial dealings in pornography. In

these circumstances, and to avoid constitutional doubt, it would be appropriate to treat an appeal of a Section 4006 order as automatically staying its effect, where there was no Section 4007 judicial order for temporary detention of mail.

Under such a rule, the burden on a mailer to take the initiative of filing an appeal from the administrative order is so slight that it could not invalidate the statutory scheme on First Amendment grounds. Cf. *Interstate Circuit v. Dallas*, supra, 390 U.S. at n. 22. There is practical assurance that the administrative action will have no effect until it has received judicial endorsement. Unlike *Freeman*, where the movie could not be shown until the censor's approval had been obtained or an appeal won, here the publisher would remain free to distribute his work throughout, and would be assured of continuing to receive mail orders and payments until a mail block had been judicially ordered.

B. A SECTION 4006 ORDER IS PROPER UNDER THIS COURT'S DECISION
IN *LAMONT v. POSTMASTER GENERAL*, 381 U.S. 103

The form of order entered at the conclusion of a Section 4006 proceeding is substantially identical to that which this Court approved for Section 4005 proceedings in *Donaldson v. Read Magazine*, supra. It states the findings made by the Department's judicial officer, and directs the appropriate postmaster to withhold certain mail bearing a stated form of address. Mail which it is clear from its wrapper is not connected with the adjudicated matter is not withheld; that which is withheld is retained in the post office

for at least twenty-four hours, where it is available for inspection by the addressee or his agent. Mail which on inspection is found not to be connected with the adjudicated matter is delivered to the addressee; uninspected mail or mail found to be connected with the adjudicated matter is stamped appropriately, to indicate the reason for its return, and returned to the sender or (if no return address is given) treated as dead letter mail.*

This procedure for inspection by addressees is required by 39 U.S.C. 4057, which protects all first class mail from inspection by postal inspectors in the absence of special circumstances not present here. To the extent that a first class letter does not show on its face whether it is connected with the adjudicated materials, there is no other way to identify it. As in *Donaldson*, the order may be restricted to certain kinds of addresses, such as commercial names, most likely to be connected with the materials, and thus minimize the risk of interfering with private correspondence. And while the inspection procedure undoubtedly imposes burdens on the respondent, there is no other means of discriminating more finely among types of

* Similarly, postal money orders sent in connection with the false representations, lottery, or adjudicated materials will not be cashed, but any money order which the recipient can show was received in another connection will be cashed. Apart from the mail stop, this aspect of Section 4005-4006 orders is no longer of substantial practical significance, since, contrary to earlier practice, postal money orders may now be redeemed at any post office; the office of redemption no longer need be specified. It is impractical to enforce a stop-payment order of the Section 4006 type on such a broad scale.

material, while still protecting the privacy of sealed correspondence from *in camera* inspection by government officials. Thus, the order is drawn as narrowly as the situation permits, in accord with the spirit of this Court's admonition that each method of dissemination presents "its own peculiar problems" and lends itself to different techniques of regulation. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503. See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87; *Times Film Co. v. City of Chicago*, 369 U.S. 43, 49; and see n. 2 *supra*.

Such considerations underlay the rejection in *Donaldson* of the contention that Section 4005, authorizing identical mail block orders in lottery and fraud cases, was overbroad. There, a broad mail block order had been entered initially, and respondents attacked it in part for the reason relied on below—that it would hinder their receipt of mail the government had no right to interfere with. Pending reargument after this Court had invited discussion of the breadth of the order, the Postmaster General modified the scope of the order to block only those letters most likely, from the form of address used, to be in response to the fraudulent scheme. The Court approved the modification, 333 U.S. at 182-185, and then rejected a sweeping constitutional attack on the statute. *Id.* at 189-192. It was evidently of the opinion, correct in our view, that any objectionable overbreadth in the mail block order would reflect an infirmity, not in the statute, but in the order. The possibility that a particular order may be overbroad is insufficient to sup-

port the judgment that Sections 4006 is unconstitutional on its face.

Lamont v. Postmaster General, 381 U.S. 301, is not to the contrary. *Lamont* involved mailing activities which were lawful. The trafficking in obscenity is not. Mr. Lamont, the addressee denied the delivery of mail, was the putative "beneficiary" of the statutory scheme to which he objected. Congress ostensibly meant to protect him, as addressee, from mail which, because of its source and content, he was presumed not to want. Under Section 4006, however, the dealer whose mail is withheld is clearly not an innocent party whose actual wishes simply differ from the presumption made by the statute. He is the very person whose mailing activities (which, it must be stressed, are found to be of a nature forbidden altogether) have given rise to the proceedings. Unlike the plaintiff in *Lamont*, he has the protection of an adversary proceeding and appellate review. In this proceeding, initiated by the government, the burden is unequivocally upon the government to show that reasons exist for bringing him within the particularized ambit of the statute; if the government fails, the dealer receives his mail in normal fashion. In *Lamont*, in contrast, all persons were indiscriminately brought within the sweep of the statute, and could free themselves of its restriction only by action which this Court held to be violative of their First Amendment rights.

Finally, in *Lamont*, the addressee who requested delivery of the material had to bear the stigma of stating on an official form that he wished to receive

documents the government had classified as "communist political propaganda." In that requirement, the Court found "a deterrent effect," for "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' " 381 U.S. at 307. No comparable stigma is imposed by the requirement that an addressee inspect his mail to claim those items which are unrelated to unlawful transactions.

C. SECTION 4006 DOES NOT OTHERWISE CHILL OR INHIBIT THE
EXERCISE OF FIRST AMENDMENT RIGHTS

The possibility that a Section 4006 order will be entered regarding particular publications does not impermissibly chill or inhibit the exercise of First Amendment rights. If its procedures are not improperly vague, and otherwise satisfy the Constitution's demands, its enforcement could not be blocked simply because persons subject to it feared its use. The logic of such an argument would equally foreclose criminal prosecution for sale of obscene matter. Some degree of self-censorship results from *any* law imposing sanctions on the mailing of obscenity. The point is that Congress is entitled to chill publication by persons who violate the obscenity laws so long as it does so in language sufficiently precise, as it has here.

Nor is it significant in this regard that the remedy here is civil rather than criminal. "One would be bold to assert that the *in terrorem* effect of [criminal] statutes less restrains booksellers in the period before the law strikes than does [an otherwise constitutional civil remedy]." *Kingsley Books, supra*, 354 U.S. at

442. It would indeed be ironic if, in the name of preventing self-censorship, the courts were to strike down the relatively mild sanctions prescribed in Sections 4006 and 4007 and require that all postal obscenity questions be determined in criminal proceedings where the dealer's very liberty is at stake.

III. SECTION 4007, WHICH PERMITS PRELIMINARY RELIEF UNDER FED. R. CIV. P. 65 AFTER AN ADVERSARY JUDICIAL PROCEEDING IN WHICH THE ALLEGEDLY OBSCENE MATERIALS ARE SUBMITTED TO THE COURT, ALSO MEETS ALL NECESSARY CONSTITUTIONAL STANDARDS.

As already noted, Section 4007 was enacted to provide interim relief in both obscenity and fraud-lottery cases, on congressional findings that frequently the major profit in such unlawful enterprises is obtained in the first few weeks of their operation. S. Rep. No. 1818, *supra*, at 2. The section permits the Post Office to obtain an order under Fed. R. Civ. P. 65 impounding mail related to the activities challenged under Section 4005 or 4006 pending the outcome of administrative proceedings and any appeal. Like the administrative orders themselves, the relief is limited to mail which is uninspected or which, upon inspection, is found to be connected with the challenged activities. See, *e.g.*, the orders entered in the Section 4007 proceedings against *The Mail Box*, App., *infra*, at pp. 41-44. If the Post Office prevails, the impounded mail is then stamped and returned to its senders according to the appropriate statutory provision; if the addressee prevails, it is then delivered to him. The need for such a measure is clear, in view of the congressional findings; as applied in Section 4006 cases, it imposes

no unconstitutional burden on First Amendment rights.

The attack on Section 4007 is premised chiefly on the contention that the finding of "probable cause" which that statute requires to justify a temporary mail detention order is insufficient. But the statute also provides that the procedures of Fed.R.Civ.P. 65 shall govern, and this in turn, we believe, assures that Section 4007 proceedings will provide "a judicial determination in an adversary proceeding [which] ensures the necessary sensitivity to freedom of expression * * *." *Freedman, supra*, 380 U.S. at 58. Under Rule 65, *ex parte* proceedings are appropriate only where time is the critical factor and a "showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180. Since Section 4007 relief could never be sought if a respondent's name and address were unknown, notification and, as a result, adversary proceedings will always be possible—and thus mandatory—in Section 4007 cases. That fact in itself assures that the challenged material will always be before the court in connection with its ruling on probable cause. In any event, under this Court's cases a finding of probable cause to believe material obscene could not be made without judicial inspection of the material. Cf. *A Quantity of Books v. Kansas*, 378 U.S. 205.

In an adversary, judicial setting, after inspection of the materials, and for the purpose only of authorizing interim relief, a finding of "probable cause" is

sufficient to defeat constitutional objection. The government bears the burdens of action and proof in these proceedings. The judge's examination of the material itself can be as thorough as if he were passing on the merits. Since only a limited class of material may permissibly be deemed obscene, *e.g.*, *Redrup v. New York*, 386 U.S. 767, the Section 4007 court must conclude that the questioned material is almost certainly within that class before it can grant interim relief. Only if the material, on its face, appeared to be in that limited class would a preliminary injunction be proper.

To be sure, there would remain the possibility that "redeeming social importance" or some other saving characteristic not apparent on the face of the materials themselves would appear at the administrative hearing, or on subsequent review. But the present restrictive judicial definition of constitutionally proscribable obscenity makes that possibility slight,⁹ and the risk would be justified by the demonstration of need for emergency relief for public interests which would also be required to warrant the granting of preliminary relief.

⁹The risk of error after such a proceeding would seem less, for example, than attends the issuance of arrest or search warrants, which may have the effect of restraining the liberty of a suspect in a criminal proceeding. And, we reiterate, the effect of a Section 4007 order is *not* directly to foreclose sales or distribution of the publication concerned (or continued operation of a scheme subject to Section 4005); those may continue, and orders and payments impounded during the life of the order will be delivered in the event the material is not found obscene. Compare *A Quantity of Books*, *supra*, 378 U.S. at 215-225 (Harlan, J., dissenting).

Under Rule 65, a showing by the government of need for emergency relief is fully as mandatory as a showing of probable cause to believe materials obscene. The congressional purpose in authorizing interim detention was to prevent commercial pornographers, lottery operators and makers of false representations from receiving the main portion of their profits while the administrative proceedings under Sections 4005 and 4006 were pending, and so effectively defeating any order that might eventually be entered. Indeed, the legislative history reflects an understanding on the Department's part, accepted by Congress, that the interim remedy would be invoked only in such cases." S. Rep. No. 1818, *supra*, at 5; H. Rep. No. 945, 86th Cong., 1st Sess. (1959) 5-7; compare S. Rep. No. 2234, 84th Cong., 2d Sess. (1956). If it appears that the flow of remittances is not substantial or that the benefit to the government of issuing a Section 4007 order would be outweighed by the inconvenience and harm to the respondent, the district court would be entirely warranted in declining to issue a temporary detention order, even if it should find probable cause. See *Hecht Co. v. Bowles*, 321 U.S. 321.

¹⁰ This factor is the sufficient answer to appellee The Book Bin's contention that the exemption of publications granted entry as second class mailing privileges from Section 4007 orders, 39 U.S.C. 4007(b), denies it equal protection of the law. Second class privileges are available only for *mailable* matter (from which obscenity is excluded, 39 U.S.C. 4001) and to established publishing houses, 39 U.S.C. 4354; *Hannagan v. Esquire, Inc.*, 327 U.S. 146, 152. It was rational for Congress to conclude that publications which qualified for second class mail privileges would not warrant application of the extraordinary remedy of Section 4007, even if occasional issues might fall within Section 4006.

Proceedings under Rule 65 also assure the respondent publisher adequate protection against delay if a Section 4007 order is entered. While it is open to doubt whether undated picture magazines, such as those at issue here, require the same expedition of process as movies or books which can be said to raise issues regarding the currency of ideas, cf. *United States v. Seventy-seven Cartons of Magazines*, 300 F. Supp. 851, 853 (N.D. Cal.), a Rule 65 order may be dissolved or modified upon motion at any time.¹¹ One such occasion would be if undue delay occurred in the administrative process; to the extent it is applicable here (in the absence of "prior restraint"); *Freedman* does not foreclose the possibility of judicial rather than legislative control of the timeliness of civil obscenity determinations. 380 U.S. at 58-59. Another occasion for reexamination of the order would be upon conclusion of the administrative hearing, during pendency of an administrative appeal; the record made in the hearing would permit reassessment of the continuing need for mail detention. Finally, the preliminary injunction itself is subject to judicial review, with the attendant possibility that a stay may be procured. 28 U.S.C. 1292(a)(1); Fed. R. App. P. 8.

¹¹The sponsor of Section 4007 in the Senate, Senator Monroney, stressed this flexibility as an advantage of Section 4007 procedure:

"The bill places the responsibility for detention of mail upon the courts instead of on an appointive officer. * * * [T]he court is always in charge. The right of freedom of communication, except where the law is being violated, is a basic personal right of all Americans. This was the right we sought to protect." (106 Cong. Rec. 15428 (1960)).

In short, while Section 4007 speaks of probable cause, judicial scrutiny will go much beyond that in practice; the proceedings takes place in the expeditious but scrupulous framework of Rule 65; and the traditional flexibility of courts of equity is available to balance conveniences, mitigate hardships and frame appropriately limited orders, subject to modification with changing conditions. For the same reasons as have already been shown with respect to Section 4006, a Section 4007 order places no improper burden on the exercise of First Amendment rights. Whether or not questions might be raised as to the scope or propriety of particular orders entered," the statute admits of constitutional application, and thus is not unconstitutional on its face.

¹³ The district court in *The Book Bin* construed the statute too broadly when it stated that a Section 4007 order could detain *all* of a respondent's incoming mail. As discussed above, p. 33, while an inspection procedure is often necessary, the only mail retained after inspection would be that specifically relating to the publications involved—in the case of *The Book Bin*, "Models of France." See, for example, the Section 4007 order entered against *The Mail Box*, pp. 41–44, *infra*. So limited, Section 4007 orders give no offense to this Court's decision in *Lamont*.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be reversed.

Respectfully submitted.

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JULY 1970.

APPENDIX

**United States District Court Central District of
California**

Civil No. 68-1983 R

**UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL, PLAINTIFFS**

v.

THE MAIL BOX, DEFENDANT

TEMPORARY RESTRAINING ORDER

Upon reading the verified Complaint of the plaintiff, and good cause appearing therefor,

It is hereby ordered that the Post Office Department is directed to detain the defendant's incoming mail for ten (10) days from the date hereof. This order is made upon a showing having been made that there is probable cause to believe that 39 U.S.C. § 400[6] is being violated by the defendant in its mailings of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls"; and "Girl Friends", and that the effective enforcement of 39 U.S.C. § 4006 can only be had if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. § 400[6].

It is further ordered that a hearing on the plaintiff's prayer for a preliminary injunction is set for the 9th day of December, 1968, at 2:00 p.m.

Dated at Los Angeles, California, December 3rd, 1968.

MANUEL L. REAL,
United States District Judge.

United States District Court, Central District of
California

Civil No. 68-1933-R

UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL, PLAINTIFFS

v.

THE MAIL BOX, DEFENDANT

PRELIMINARY INJUNCTION

This cause came on for hearing on December 11, 1968, before the Honorable Manuel L. Real, United States District Judge presiding; the Court having announced its findings whereby the Court found that a preliminary injunction should issue under 39 U.S.C. § 4007 because there is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mailing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls" and "Girl Friends"; and that the effective enforcement of 39 U.S.C. § 4006 can only be had if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. 4006; it is therefore,

Ordered that a preliminary injunction issue, and it is hereby issued, directing the Post Office Department to detain the defendant's incoming mail during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

It is further ordered that the detained mail may be opened to examination by the defendant and such mail shall be delivered to the defendant as is clearly not connected with the alleged unlawful activity.

Dated: This 26th day of December 1968.

MANUEL REAL,
United States District Judge.

United States District Court
Central District of California

Civil No. 68-1983 R

UNITED STATES OF AMERICA AND THE POSTMASTER
GENERAL, PLAINTIFFS

v.

THE MAIL BOX, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on December 11, 1968, before the Honorable Manuel L. Real, United States District Judge presiding; the Court having considered the affidavits filed by the respective parties and the magazines and advertising which are the subject matter of this proceeding; and the matter having been submitted to the Court for its decision, the following are announced as the Court's Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

There is pending an administrative proceeding in the Post Office Department which is being held under 39 U.S.C. § 4006.

II

The Postmaster General has applied for a preliminary injunction under the authority of 39 U.S.C. § 4007.

III

There is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mail-

ing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls"; and "Girl Friends".

IV

Effective enforcement of 39 U.S.C. § 4006, can only be had with respect to the magazines listed in Finding of Fact No. III, if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

CONCLUSIONS OF LAW

I

This Court has jurisdiction under 28 U.S.C. § 1345 and 39 U.S.C. § 4007.

II

There is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mailing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls"; and "Girl Friends".

III

The preliminary injunction being prayed for by the Postmaster General should issue under 29 U.S.C. § 4007 to preserve the status quo during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

Dated: This 26th day of December 1968.

MANUEL REAL,

United States District Judge.

Post Office Department, Washington, D.C.
P.O.D. Docket No. 3/9

IN THE MATTER OF THE COMPLAINT AGAINST THE MAIL
BOX AT P.O. Box 3192, NORTH HOLLYWOOD, CALIFORNIA

Departmental Decision

APPEARANCES:

For the Complainant:

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Jerry P. McKinnon, Esq.

Office of the General Counsel

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For the Respondent:

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INTRODUCTION

By complaint filed November 1, 1968, the General Counsel of the Post Office Department (the Complainant) alleged that The Mail Box (the Respondent) is conducting through the mails an enterprise in violation of 39 U.S.C. § 4006. The Complainant concurrently moved for an expedited hearing to be presided over by the Judicial Officer. On November 4, 1968 the Judicial Officer granted the motion for the expedited hearing.

The Respondent's answer, filed November 18, 1968, denied the allegations of the complaint. The Respondent concurrently moved to dismiss the complaint upon the grounds that it failed to state a violation of § 4006, that it violates the Respondent's rights under the First and Fifth Amendments to the United States Constitution, and that the seven magazines against which the complaint was brought (hereinafter the "Magazines") are legally indistinguishable from others heretofore found to be protected. The Respond-

ent also requested that the Judicial Officer take judicial [sic] notice of certain of those previous decisions. By reply filed November 22, 1968 the Complainant argued against the Respondent's motion and cross-moved to strike portions of the Respondent's pleadings. On November 26, 1968 the Judicial Officer denied both the Respondent's motion and the Complainant's cross motion, and ruled that Postal Manual § 821.331 (b) deprives him of the authority "to determine the constitutionality of statutes".

The hearing herein was held in Los Angeles, California, on December 3-5, 1968. At the conclusion thereof the Judicial Officer announced that decision would be reserved pending submission of proposed findings of fact and memoranda of law by the parties. Such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Complainant.

Counsel for the Respondent moved that a copy of the transcript be supplied to the Respondent free of charge. The Judicial Officer denied the motion, without prejudice to later renewal, upon the ground that counsel had failed to make any showing in support thereof. Counsel then asked that he be permitted to submit his memorandum without page citations of the record. The request was granted.

The final volume of the transcript was delivered to counsel for the Complainant on December 18, 1968 and the latter's proposed findings of fact, proposed conclusions of law and memorandum of law were filed on December 23, 1968. A similar document on behalf of the Respondent was filed on December 28, 1968.

THE COMPLAINT

The complaint charges as follows:

"The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges, that under the name set forth in the caption hereof (hereinafter called the Respondent) there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U.S. Code, and in support of that belief alleges as follows:

"(1) That the Respondent is now and for some time heretofore has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles namely certain magazines;

"(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles and things of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

"(3) That attached hereto as Exhibits A through G are true copies of the said circular matter mentioned in the item next above;

"(4) That to persons remitting to Respondent, the sums of money stated in the aforesaid advertisements and solicitations, Respondent sends articles, among them the following magazines which are of an obscene, lewd, lascivious, indecent, filthy or vile nature;

" 'ME'

" 'GIGI'

" 'SUSY'

" 'MATCH'

" 'BUNNY'

" 'GOLDEN GIRLS'

" 'GIRL FRIEND'

"(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy, or vile articles to all those who make appropriate remittances of money therefor.

"WHEREFORE, pursuant to the provisions of Title 39, U.S. Code, Section 4006, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE MAIL BOX, or agents or representatives as such, in accordance with the provisions of said Title 39, U.S. Code, Section 4006."

THE EVIDENCE

Six witnesses appeared on behalf of the Complainant. The thrust of their testimony was as follows:

Donald Schoof, a postal inspector, established jurisdiction and testified with respect to the conduct of the investigation of this case.

Marshall La Cour, head of the photography department at Cypress Junior College, Cypress, California was established as an expert in photography and testified that the photographs in the Magazines displayed poor photographic composition and technique and that they were inartful and entirely without aesthetic quality.

Dr. Melvin Anchel, a psychiatrist, testified that the Magazines lacked any kind of psychological or other value for normal persons of any age, can arrest the normal development of children, can cause "cliff-hanging" adults to regress to an earlier stage of sexual development and "are making neurotics." He described them as unwholesome and dangerous even to psychologically healthy adults who are more than casually and infrequently exposed to them because of the Mag-

azines' obsessive preoccupation with a distorted view of sex. He found them a "cancer" on society.

E. Richard Barnes, a California State Assemblyman, testified that some of his constituents complained to him about materials which they regarded as obscene, but which he thought were considerably less explicit than the Magazines.

Arthur J. Kates, the head of a large periodical distributing company covering all types of neighborhoods in Los Angeles, stated that his company would not agree to distribute the Magazines and that if it did its business would be destroyed.

Charles Crecelius, a salesman, former elementary school principal and vice chairman of the Los Angeles County Commission on Obscenity and Pornography, was established as a person who has expertise concerning the contemporary community standards in the Los Angeles area and in the United States relative to sexual matters. Mr. Crecelius testified that the Magazines affront contemporary community standards in Los Angeles and the United States relating to the description or representation of sexual matters.

The only witness testifying for the Respondent was *Robert C. McDaniel*, Esq., a practicing lawyer who appeared for the Respondent herein and serves as an associate of Stanley Fleishman, Esq., the Respondent's attorney, Mr. McDaniel was qualified as an expert in constitutional law with particular reference to obscenity. He opined that the Magazines were protected by previous court decisions which had held other magazines which he found comparable to be not obscene.

DISCUSSION

Six of the seven Magazines are composed of exactly 32 printed pages roughly 8½ by 11 inches in size,

stapled together in typical magazine form. The 24 pages of the seventh magazine, *Me*, measure about 5½ by 8½ inches. Each of the Magazines is composed largely of photographs of nude or semi-nude women. Such scant written material and advertising as appears in the Magazines relates exclusively to subjects bearing upon physical sex and nudity.

The seven Magazines can be divided into three categories, insofar as their content and format are concerned:

1. *Girl Friend*, *Golden Girls*, *Bunny* and *Match* follow an identical format. The 32 pages (including covers) of each magazine are precisely divided into:

—23 pages of photographs in each of which one nude woman is shown, usually with thighs spread so as to display her genitals. None of the photographs is captioned or specifically linked in subject with the magazines' written material.

—3¼ pages are devoted to a table of contents and advertisements displaying the covers of other publications of a similar nature, touting a "nudist film," Danish "studies in the nude art" and a certain "Studio 'A'" in New York City where one is invited to "photograph female figure models" or skin paint—"try your own designs directly on our female FIGURE MODELS."

—5¾ pages are divided among four articles which are either unsigned or attributed to such presumably pseudonymous authors as "Stanley Sorrel," "Stan Morrel," and "Stanley Howard," or "Hal Lyons" and "Hal Saint." The articles are given titles such as "Invitation to Rape," "Paradise for Swingers," "Is Wife-swapping for Real?" and "The Nude Imperiled."

The only variation to this rigid formula is found in *Golden Girls*, which substitutes an additional half-page of articles for a half-page of advertising. Each of these four of the Magazines lists one Bradford I. Boone as its editor. An identical statement below the table of contents in *Girl Friend* and *Bunny* describes each magazine as:

a publication seeking to communicate contemporary views relating to sex to prevailing mores. We observe and report on life as it is.

The parallel statement in *Golden Girls* and *Match* proclaims each of those publications as:

a journal equating the nude to contemporary mores. Its goals will be achieved by way of free communication and exemplary photo-artistry establishing the wholesomeness, beauty and charm of the unadorned figure.

2. *Gigi* and *Susy* allot their 32 pages in slightly different proportion.

—28 pages of *Susy* and 28¾ pages of *Gigi* are given over to captionless photographs of lasciviously posed nude girls. In *Susy* only a total of 5 pages of photographs depict more than one girl per study, but in *Gigi* more than half of the pictures show two or three naked women embracing or otherwise disporting themselves, with the major photographic focus upon their genitals.

—2 pages go to advertisements beckoning the reader to buy more pictures of some of the girls purportedly shown in the two magazines, an "unretouched female indoor nudist film" and still photo-sets, and two magazines, one of which is called *Lesbianism—A Sexual Study* ("100 intimate fotos [sic] of lesbians—20 case histories") and the other *Sadism and Masochism* ("60 intimate fotos—20 models" and a thorough study on "spanking and the Lesbian" and "homosexual spanking").

—*Susy* devotes its remaining 2 pages to an unsigned story entitled "The Conversion" which purports to detail, in the first-person, the seduction into lesbianism of a girl increasingly dissatisfied with her intensely active heterosexual life. *Gigi* spares about 1¼ pages to a fictional story about a girl's successful utilization of her body on the road to movie stardom.

Neither magazine contains a printed word other than in its single story, the two pages of advertising and the front cover.

3. The only printed words appearing in *Me*, the seventh magazine, are on its cover. The rest of the publication is given over entirely to the familiar gallery of uncaptioned photographs of one or several naked women in the usual noisome poses.

The women depicted in each of the Magazine's photographs are almost always positioned in such a fashion as to display their genitals prominently and in clinical detail. The models are typically portrayed with thighs widely parted or in some other forced and unnatural position which serves to spread or otherwise feature their organ and focus attention upon it. When they are shown partially clothed the clothes are so arranged as to further stress the photographic focus on the sexual organ.

Printed in 1/8 to 1/4 inch type at the bottom of the front cover of each of the Magazines there appear the words "Adults Only" or, in the cases of *Susy* and *Gigi*, "For Adults Only." The order blanks attached to the Respondent's circulars bear a statement that the remitter must be at least 21 years old. However these outward manifestations of Respondent's concern are not part of a serious effort to deter indiscriminate circulation of the Magazines to minors. On the contrary, they serve both as additional enticement and as a sort of verbal screen behind which the Respondent con-

ducts its business in a fashion which negatives such concern and which, in fact, almost precludes further efforts to ascertain a remitter's age.

Donald Schoof, the postal inspector, in establishing jurisdiction, testified to the complaint of postal patrons against mail receipt of the Respondent's pandering solicitations and his own use of the mails in sending for the Magazines (34 ff.).* Mr. Schoof's testimony revealed that he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return. He could quite easily have been well under 21 years of age for all the Respondent knew or, one may suppose, cared.

In *Roth v. United States* (1956) 354 U.S. 476 and in several decisions that followed the United States Supreme Court defined obscenity in these terms [*Memoirs v. Massachusetts* (1965) 383 U.S. 413, at p. 418]:

* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The evidence adduced by the Complainant established that the dominant theme of the material taken as a whole appeals to the prurient interest [*Roth v. United States, supra*, at p. 489; *Memoirs v. Massachusetts, supra*, at pp. 418-19; *Jacobellis v. Ohio* (1963)

*References, unless otherwise noted, are to pages of the typed transcript of the hearing.

378 U.S. 184, 191; *Manual Enterprises v. Day* (1961) 370 U.S. 478, 486-8].

The witness Dr. Anchell did not know the meaning of the word "prurient" (134-5, 223), but he did describe the Magazines in terms which are used by the Webster Dictionary to define "prurient"—namely, "1. having lustful ideas or desires. 2. lustful; lascivious; lewd: * * *." Thus, the doctor found the Magazines, among other things, "lewd," "lascivious" and "filth" and stated that their effect would be to stimulate the reader sexually and push him in the direction of perverted forms of sexual expression—"It conjures up earlier developmental stages, times which the visual gave this individual or the exhibitionist, voyeuristic pleasures gave this individual more satisfaction than the normal mature sexuality, and so he is brought back very strongly with such stimuli." (151, 136-152, 161-6, 181-2, 223-5, 248-9.)

Mr. La Cour, the photographer, testified that in almost every one of the photographs in the Magazines the pubic area of the model shown has been "fore-shortened"—that is, a photographic technique has been used to bring the model's pubic area too close to the camera for correct perception in order to "force" the observers' attention upon it (100-1).

Any lingering doubt about the Respondent's intent to appeal to the prurient interest and its success in so doing is dissipated by an examination of the circular [Exhibits A, B, F2(1), N-1(b)] by which the Respondent advertised the Magazines and solicited orders for them [see *Ginzburg v. United States* (1965) 383 U.S. 463, 470-4 and *United States v. Rebhuhn* (C.A. 2, 1940) 109 F.(2d) 512, 515, concerning role of advertising]. Each of the Magazines was advertised in flyers which appeal to the full range of human sexual deviations and perversions. Thus we find an

issue of *Me* advertised under the heading "Female Nudist Specials" among photos of the covers of 24 other such publications each of which shows a nude or semi-nude girl in a pose typical of those in the Magazines themselves. The same circular advertises, in the same manner, 25 "Spanking, Bondage & Flag Mags.," "20 New Paperbacks * * * bound in full color covers * * * banned from the U.S.A. until recently" and 18 "Sexual Study Books" including *Sadism and Masochism*, *Female Masturbation*, *New Breast Fetishism* and *A Study of the Peeping Tom* * * * *Plus 60 Revealing Photos of Women Caught Unaware of the Fact that they were being Photographed NUDE.*

Suffice it to say that the other advertising adduced at the hearing, by which the Respondent solicited orders, is characterized by the same unrelieved, leering sordidness. For accuracy, none of the advertising can surpass Exhibit F2(1) which, in touting *Girl Friend*, *Bunny*, *Golden Girl* and *Match*, promises:

Unusual photographic techniques, exploring every nook and cranny of the female form. Additional emphasis is placed on the *inner* beauty of our models, as the camera explores bodily regions never attempted before. Close attention to detail * * *.

If the dominant theme of the material taken as a whole—largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera—cannot be taken as an appeal to the prurient interest then, indeed, the word "prurient" and those other words by which it is defined have ceased to have any meaning.

The second of the elements of obscenity requires an inquiry as to whether the Magazines are patently offensive because they affront contemporary community standards relating to the description of repre-

sentation of sexual matters [*Roth v. United States*, *supra*, at p. 489; *Memoirs v. Massachusetts*, *supra*, at pp. 418-19; *Jacobellis v. Ohio*, *supra*, at pp. 191-5; *Manual Enterprises v. Day*, *supra*, at pp. 486-7].

Exhaustive examination on the point established the witness Crecelius' unusual interest and activity in the area of pornography and obscenity. It was clear that he approached the problem from his own personal standpoint and lacked a sophisticated background in the subject. However, it became equally evident that his sustained interest, voluntary work and official position in his home community of Los Angeles, and wide and continuous travel and inquiry on the subject within the United States, qualified him to deliver an opinion regarding contemporary standards in Los Angeles and the United States relating to the description or representation of sexual matters. In his opinion the Magazines fell below such standards.

Mr. Barnes, the assemblyman, testified that Californians "repeatedly" (273) complained to him about materials considerably less explicit than the Magazines.

Mr. Kates, the owner and chief executive officer of Sunset News Company, a large periodical distributor in the Los Angeles metropolitan area, testified that Sunset distributes, *inter alia*, magazines such as *Playboy*, *True* and *Cavalier*, which depict women in the nude or semi-nude. However he said, "I can make the unqualified statement if the Sunset News Company distributed any one of the periodicals that I have examined [the Magazines] to our dealers, they would not only not be accepted, but it would result in the destruction of Sunset News Company" (290-1). He further declared that "The distribution of these periodicals in my opinion through any legitimate trade

channels would result in the destruction of those channels. They are not acceptable at any price" (298).

I find that the Magazines considerably exceed the customary limits of candor in the United States and affront contemporary community standards relating to the description or representation of sexual matters. They are therefore patently offensive.

Even though the Magazines' patent offensiveness and their appeal to the prurient interest have been ascertained they cannot be found obscene unless it can also be determined that the material they contain is without "the slightest redeeming social importance" [*Roth v. United States, supra*, at p. 484; *Memoirs v. Massachusetts, supra*, at pp. 418-19; *Jacobellis v. Ohio, supra*, at p. 191].

Dr. Anchell's persuasive and uncontroverted testimony established that, far from having any beneficial effect upon readers young and adult, emotionally stable and unstable, perverted and "normal," this material could only have a distinctly damaging impact if it had any at all. The best that could be hoped for was that it would have none.

From the witness La Cour we learned that the pictures, which occupy anywhere from a minimum of about eighty percent to a maximum of one-hundred percent of the Magazines' space, are bad photography and lacking in artistic or aesthetic quality.

Me, of course, lacks written material, and only $1\frac{1}{4}$ pages in *Gigi*, 2 pages in *Susy*, $5\frac{3}{4}$ pages in *Girl Friend*, *Bunny* and *Match*, and $6\frac{1}{4}$ pages in *Golden Girls* are given over to some kind of writing. Each of them, with the exception of the fiction in *Gigi* and *Susy*, is devoted to some ostensibly serious topic on the subject of sex or nudity. None of them makes any attempt to contribute to the sum of human knowledge, seriously promote a social cause, provide useful in-

formation, or even entertain, except perhaps by catering to the presumed needs of particularly obsessive readers. The same can be said of *Gigi's* and *Suey's* fiction.

The pro-forma assertions of serious intent hoisted like a talisman near the mastheads of *Girl Friend*, *Golden Girls*, *Bunny* and *Match* and quoted on page 8 hereof, proclaim a serious and socially redeeming value which those and the other Magazines fail to deliver. Needless to say the Respondent's advertising heralds the very reverse of the serious social purposes which the Magazines proclaim they serve. The mere recitation of a formula or the insertion of a few stock paragraphs or pages of written filler material will not serve to lend redeeming social importance to a publication which would otherwise lack it.

I find the Magazines lacking "even the slightest redeeming social importance."

The Respondent's case was based entirely upon the contention that various courts of law and the Post Office Department itself had passed upon other publications represented as being of a similar nature and had found them to be not obscene. In other words, the Respondent offered no evidence in rebuttal of the Complainant's case but, rather, argued the law.

The precedents presented and the samples of the materials on which they turned are as follows (in the order offered):

United States v. Three Packages, Civil No. 68-25-F, Exhibits 3-9.

U.S.D.C., Cent. Dist. Cal. (Ferguson, J.), findings of fact and conclusions of law, Feb. 20, 1968 (Exhibits R-1).

United States v. 80 Cartons, Civil No. 68-480-1H, Exhibits 6-10.

U.S.D.C., Cent. Dist. Cal. (Hill, J.), findings of fact and conclusions of law, April 30, 1968 (Exhibit R-2).

Magazines which enjoy second-class mailing privileges granted by the Post Office Department. Exhibits 13-20.

People v. Bonanza Printing Co., Inc., et al., No. 317074, Exhibits 21-22.
Los Angeles Municipal Court (Ackerman, J.), Nov. 8,
1968.

Felton v. Pensacola (1968) 390 U.S. 340----- Exhibits 23-27.
United States v. Six Parcels of Photographs, Civil No. Exhibits 28 a-e.
66-1129-PH, U.S.D.C., Cent. Dist. Cal. (Hall, J.), order
granting motion for Summary Judgment and Judgment,
Dec. 3, 1968 (Exhibit R-28).

In rebuttal, the Complainant offered the decision, findings of fact, conclusions of law and order of dismissal of the U.S. District Court for the Central District of California (Hauk, J.) in *Marvin Miller, et al. v. Thomas Reddin, et al.*, No. 68-712-AAH, of November 18, 1968 (Exhibit O) and *Female Photographs* (Exhibit O-1), one of the publications passed on in that case. Subsequent to the hearing herein another judge of the same court (Real, J.) found the same publication not obscene in a criminal trial of that issue (*United States v. Marvin Miller*, Nos. 1842, 2166, 2396).

I find that none of these decisions provide me with a binding precedent. In *Felton v. Pensacola, supra*, the Supreme Court, citing *Redrup v. New York* (1967) 386 U.S. 767, held distribution of the materials at issue to be protected by the First and Fourteenth Amendments. It is obvious at a glance that the materials which the Court there ruled on differ from the Magazines here at issue in several particulars touching upon each of the three elements by which the Supreme Court defined obscenity in *Roth* and the decisions that followed.

Without getting into matters of comparison, I find that the value of the three California district court decisions offered by the Respondent as precedents in defining the parameters of permissible expression, is nullified by the same court's contrary holding on the book *Female Photographs* (Exhibit O-1) in *Miller v.*

Reddin, supra, which, in turn, is further confused by the holding in *United States v. Marvin Miller, supra*. Nor will I accept a decision of the Los Angeles Municipal Court as a binding interpretation of obscenity under the federal statute. Likewise, the mere granting of second-class entry to certain publications establishes no formal or informal precedent which is binding upon the Judicial Officer in rendering a departmental decision. The regulations of the Department provide that such action is actually subject to the Judicial Officer's review on appeal by a rejected applicant. It might also be noted that on only one occasion since the Supreme Court raised a fundamental question as to the Department's administrative jurisdiction in 1961 in *Manual Enterprises v. Day, supra*, has the Department sought to deny second-class entry to a publication on grounds of obscenity.

For some years now the basic questions relating to obscenity have given rise to an intense public debate: Is the concept of obscenity worthy of retention; do concededly obscene materials indeed have an unwholesome or unhealthy effect upon society or any of its individual members; and do any public agencies therefore have the right to inhibit the free circulation of concededly obscene materials on that ground? The ultimate answers to these questions must await, among other things, greater empirical knowledge of the impact of erotica on society. But for the present the appropriate authorities in our society, the Congress and the United States Supreme Court, have answered all three questions in the affirmative. The Congress has also long imposed upon this Department the right and duty of exercising a certain limited scrutiny over materials distributed through the mails, and the Supreme Court has not specifically relieved us of that function.

Since the concept of obscenity as an offense to society's standards and best interests yet remains in our system of law, it would be logically inconsistent to deprive it of any meaningful content. No fair-minded observer could possibly conclude that these Magazines with their page upon endless page of pictures of naked women with spread thighs, are designed for any purpose other than as an appeal to the prurient interest; and one would have to be prepared to conclude that the prurient appeal is of itself socially important in order to discern the element of redeeming social value in the Magazines. While that portion of the Complainant's presentation specifically directed to the issue of offense to contemporary community standards was not particularly impressive, the evidence as a whole amply established the fact that Americans as a whole are not yet prepared to grant such grossly commercial, artistically worthless, socially unexpressive and otherwise valueless erotica an accepted place in the panoply of diverse utterances which flourish in a free society.

Hence until such time as the concept of obscenity has been abandoned for good and all or so drastically restricted as to apply, for example, only to depictions of sex acts—as the California Supreme Court is recently reported to have suggested—or until this Department is conclusively stripped of its legal duties in regard to obscenity, there can be no doubt that prevailing legal and cultural norms require the findings and conclusions contained herein.

In accordance with the foregoing decision I now make my formal Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. The Respondent has deposited in the mails advertisements or circular matter giving information as to where, how or from whom the magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 could be obtained.

2. The Respondent sent the aforesaid magazines to persons remitting to the Respondent the sums of money stated in the aforesaid advertisements or circular matter.

3. The dominant theme and predominant appeal of each of the aforesaid magazines, taken as a whole, is to the prurient interest in sex. They are patently offensive to contemporary community standards relating to the description or representation of sexual matters and are utterly without redeeming social importance.

4. The following Conclusions of Law, insofar as they may be deemed Findings of Fact, are so found to be true in all respects. From the foregoing facts I conclude:

CONCLUSIONS OF LAW

1. The magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 are obscene, and therefore do not constitute constitutionally protected expression.

2. "The Mail Box" is a person who is obtaining or attempting to obtain remittances of money through the mail for the seven aforesaid magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

3. "The Mail Box" is a person who is depositing, or causing to be deposited, in the United States Mail

information as to where, how and from whom the addressee may obtain magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

4. The activities set forth in conclusions 2 and 3 constitute a violation of the provisions of 39 U.S.C. § 4006 governing the use of the United States Mails for the advertising of, or receipt of remittances for unlawful matter.

5. Any Conclusions of Law contained in the Findings of Facts are incorporated herein by reference.

CONCLUSION

For all of the foregoing reasons I find that the Respondent's activities complained of constitute an enterprise in violation of 39 U.S.C. § 4006. An order to the appropriate postmasters pursuant to the provisions of 39 U.S.C. § 4006 will, accordingly, issue forthwith.

PETER R. ROSENBLATT,
Judicial Officer.

MEMORANDUM—U.S. POST OFFICE DEPARTMENT

DECEMBER 31, 1968.

Subject: Transmittal of unlawful order.

From: Judicial Officer, Post Office Department, Washington, D.C. 20260.

To: Postmaster, North Hollywood, California.

In reply refer to: P.O.D. Docket 3/9.

I enclose herewith a copy of Order No. 68-103, dated December 31, 1968, forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192

at

North Hollywood, California 91609

This order does *not* cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks, or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address.

PETER R. ROSENBLATT,
Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, December 31, 1968.

Order No. 68-103.

To the Postmaster at North Hollywood, California
91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P.O. Box 3192
at

North Hollywood, California 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86-676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respond-

ent. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmasters at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

P.O.D. Docket No. 3/9, G.C. 4370.

PETER R. ROSENBLATT,

Judicial Officer.

POST OFFICE DEPARTMENT,

JUDICIAL OFFICER,

Washington, D.C., July 6, 1970.

P.O.D. Docket No. 3/9
(In the Matter of the Complaint Against
THE MAIL BOX
at
P.O. Box 3192
North Hollywood, California 91609

ORDER

The Complainant has filed an application to clarify Order No. 68-103, dated December 31, 1968, in regard to the case appearing in the caption hereof. The clarification requested consists of the identifying by name of the magazines which the Judicial Officer found in this proceeding to be obscene.

Good cause therefor being shown, and since the clarification requested will not be prejudicial to the rights of the Respondent, the application for clarification of Order No. 68-103, dated December 31, 1968, is hereby granted and a new order bearing the number 70-24 and bearing the same date as the date of this order will issue forthwith.

WILLIAM A. DUVALL,
Acting Judicial Officer.

MEMORANDUM

JULY 6, 1970.

Subject: Transmittal of unlawful order.
From: Judicial Officer, Post Office Department, Washington, D.C. 20260.
To Postmaster, North Hollywood, CA 91609.

I enclose herewith a copy of Order No. 70-24, dated July 6, 1970 forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

This order does not cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address. As used herein, the terms "activity" and "enterprise" should be interpreted as being limited to the sale or the attempted sale through the mail of the seven publications named in the accompanying order.

WILLIAM A. DUVAL,
Acting Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, July 6, 1970.

To the POSTMASTER at North Hollywood, California 91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P. O. Box 3192
at

North Hollywood, CA 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, the same being specifically identified as the seven magazines ME #4, GIGI #3, SUSY Vol. 1 #1, MATCH, BUNNY #1, GOLDEN GIRLS #1, and GIRL FRIEND #1, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86-676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respondent in payment for the adjudicated magazines. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to the said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmaster at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

WILLIAM A. DUVALL,
Acting Judicial Officer.

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IN THE
Supreme Court of the United States

October Term, 1970

NOS. 55 and 58

**UNITED STATES OF AMERICA AND
THE POSTMASTER GENERAL,**

Appellants,

v.

THE BOOK BIN,

Appellee.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA**

BRIEF FOR APPELLEE

STATUTORY BACKGROUND

I. Section 4006:

Although *Section 4006* was modeled on *Section 4005* in its enactment the provisions vary greatly. Whereas *Section 4005* deals with the elements of fraud and fraudulent schemes and the obtaining of monies through this type of scheme,

Section 4006 does not in any way purport to involve anything except *First Amendment* materials. Where a Section 4005 violation may involve selling fraudulent goods and wares, i.e., stocks, bonds, merchandise, a Section 4006 violation involves the freedoms of expression, speech and press, i.e., books, magazines, periodicals, newspapers, etc. The former is objectionable upon the grounds of fraud whereas the objection interposed against Section 4006 material does not recite fraud in any form but bases the objection solely upon literary and graphic depictions as not being acceptable to the Postmaster General and his employees, i.e., the General Counsel and the hearing examiners.

An additional infirmity in appellant's brief is that he cites *Donaldson v. Read Magazine*, 333 U.S. 178 as supporting the constitutionality of Section 4006 and its procedures. Actually the *Donaldson* case was upheld only after the Postmaster General modified his mail block order to only include mail addressed to the puzzle contest (Pp. 182-183); and would not impose such a bloc;

"... to the magazines, to their editor, or the three corporate respondents."

and yet under Section 4006 the Postmaster General may stamp unlawful and return to the senders "registered letters or other letters or mail..." and refuse payment of money orders or postal notes for "such a person or his representative..."

This then effectively creates a total mail block. The mail matter itself does not have to be obscene nor do the money orders have to be connected only with an obscene publication. Whether the mail is not impounded by the Postmasters is immaterial for if one cannot receive then the receipt of mail is completely neutralized. All this may be had

without judicial determinations being had. As construed by the United States Supreme Court, *Section 4005* is not comparably as broad. Therefore the validity of *Section 4005* has no bearing whatsoever to *Section 4006* and the matter at bar.

II. Section 4007

This provision imposes no time limit upon the District Court or postal authorities within which an injunctive order must expire for staleness. Theoretically, the injunctive order may be imposed to the point that a commercial disseminator will have to go out of business. The statute recognizes that an injunctive order may be issued until "... the conclusion of the statutory proceedings and *any appeal therefrom.*" (Emphasis supplied).

Appellant recognizes the extent of time for ultimate departmental findings;

"The proceedings can take so long that distribution is essentially complete by the time an administrative order can be entered." (Pp 8 appellant's brief)

In the face of this, appellant recognizes the delay inherent within administrative proceedings by citing the revisions of the Code enacted by Congress to permit the postal authorities to seek a mail block by showing a mere "probable cause" to a District Court effectively escaping any time limitation. This latest revision removes all time limitations from the Postmaster General and permits a hearing;

"(W)henever practicable... within 30 days of the date of the notice" 39 C.F.R. Section 952.7

and upon hearing had the Postal Examiner is only required to issue his findings with:

"all due speed," 39 C.F.R. Section 952.4.

In the face of this there are other provisions for a rehearing without ever resorting to the Courts for a hearing upon the merits. The postal authorities lose nothing since a mail bloc precludes dissemination yet the mail recipient has no alternative but to face this delay without recourse merely upon a showing of "probable cause" and thereafter seek his own judicial review without the injunctive order ever expiring.

SUMMARY OF ARGUMENT

Appellee agrees with the statement of appellant that the exercise of *First Amendment* freedoms limits the actions Congress may take in regulating the postal services. It is this limitation that is before the Court in the premises. Frauds and lotteries cannot in any way be equated with the publications and therefore may not be used to premise the thought that the appellee intends to or may actually use the mails uncontrolled by Congress.

There is no similarity between obtaining money by fraud from unsuspecting citizens and the dissemination to persons wishing to receive the presumptively protected materials carried in the mails. At no time has appellee contended that the *First Amendment* confers complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography. In reality the material herein has not been judicially determined as pornography or as being obscene in the constitutional sense.

The reading of *Stanley v. Georgia*, 394 U.S. 557 again reveals the sensitive nature of the freedoms coveted by the founding fathers espoused by this Court. That decision turned upon the right of a United States citizen to possess and view materials whether obscene in the eyes of the law or not where this possession and viewing did not encroach upon the rights of others.

It then becomes a question of whether this right of possession requires a criminal act or an act to be precluded by the postal authorities in order to be fully exercised. In summary, must one create a criminal act of sale and purchase or as in this case seek and receive purportedly non-mailable matter and have his postal money order payment, obtained lawfully then dishonored and refused to be honored as payment for that which may constitutionally be possessed and enjoyed by him. By what principle may a public service agency become censors of the public's reading and entertainment materials? This Court recognized in *Stanley*, supra, that these freedoms are fundamental to our way of life.

ARGUMENT

I.

- A. Congress may not grant and the Postmaster General may not invoke mail blocks for the sole purpose of censorship.

The Constitution of the United States grants to Congress the duty to establish post offices and post roads. And under the commerce power may legislate against interstate acts. Together the Congress may set up what constitutes a crime and punishment for its commission. That is the recognized means to regulate intolerable acts. Congress should not delegate to administrative agencies criminal determinations where constitutional liberties are at stake.

While obscenity is subject to regulation and proscription, the statute of necessity must conform to those procedures that do not inhibit the free exercise of speech and press that are protected. These enactments do not protect these freedoms but engulf them in an all encompassing statute, the good and the bad.

Congress has seen fit to regulate obscenity in the mails, 18 U.S.C. 1461, and has provided criminal penalties for engaging in such conduct. Appellant contends that the statutes herein reflect an intention of Congress to curb the commercial exploitation through the mails of pornographic matter. Congress, however, has already provided a criminal penalty for such violations. A criminal statute, however, requires the burden of proof to be beyond a reasonable doubt, and it of necessity must follow an adversary hearing with the burden of persuasion upon the enforcement officials. The converse is true under these statutes. Postal authorities need only institute the necessary administrative proceedings within the Post Office Department to be in the position of seeking and obtaining a mail block. In enforcing the mail block aided by an injunction order, they need only show "probable cause." There is no judicial finding of obscenity of the particular material. Additionally, a completely effective mail block is imposed with no resultant distribution. The recipient then must of necessity take certain actions in order to receive any mail and then only when it is shown that the mail matter is clearly unconnected with the allegedly obscene material.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative decision or in combination with a sweeping order under Section 4007, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost

importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"... the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

Postal blocks are clearly repugnant to the *Constitution of the United States*. This Court has settled the law that postal blocks are unconstitutional by placing a duty upon the restricted recipient to act in order to enjoy the free use of mail distribution. The power of censorship has never been given to the Postmaster General. This Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, stated the following of the censorship power undertaken there by the Postmaster General:

"An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred. (Emphasis supplied)

"We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the Court held in *ex parte Jackson*, 96 U.S. 727, 24 L. ed. 877, that Congress could constitutionally make it a crime to

send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

And in *Martin v. Struthers*, 319 U.S. 141, this Court dealt with a municipal ordinance forbidding the door to door dissemination of pamphlets and periodicals. It was stated:

"The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

How different is it that the judgment of the recipient and disseminator of *First Amendment* materials is substituted in the case at bar for the judgment of the Postmaster General and other postal authorities.

And again as stated as early as 1921 in the case styled *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, in Justice Holmes' dissenting opinion, at page 437:

"The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."

This Court had before it another case involving obscene mail matter in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. The Court struck down the lower court ruling but could not agree upon a single opinion. However, Mr. Justice Brennan and two other members of the Court in a separate opinion stated:

"We have sustained the criminal sanctions of Sec. 1461 against a challenge of unconstitutionality under the *First Amendment*. *Roth v. United States*, 354

U.S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. We have emphasized, however, that the necessity for safeguarding *First Amendment* protections for nonobscene materials means that Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731, 6 L. ed. 2d 1127, 1136, 81 S. Ct. 1708. I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts."

Mr. Justice Brennan then cited with approval a quote from one of the Court's prior decisions entitled *Hannegan v. Esquire, supra*:

"The provisions...would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. *Hannegan v. Esquire, Inc.*, 327 U.S. at 156, 90 L. ed. 586, 66 S. Ct. 456. I, therefore, concur in the judgment of reversal."

The Court in *Lamont v. Postmaster General*, 381 U.S. 301, quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But when habit and law combine to exclude every other (means of transportation of mail) it seems to me that the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in

the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . ."

B. The Constitutional right to private possession of obscene materials envisions the Constitutional right to obtain and receive them and conversely the right to disseminate them to consenting adults under controlled circumstances.

Consonant with an individual's right to private possession of obscene materials, *Stanley v. Georgia*, 22 L. Ed. 2d 542, there must be a correlative right for that individual citizen to acquire such material and transport it to the privacy of his home. For the right to possess necessarily requires and presupposes an individual's right to acquire and upon acquisition the right to transport it or have it delivered to the privacy of his home.

The United States Supreme Court in *Stanley v. Georgia*, 22 L. Ed. 2d 542 stated the following of an individual's right to private possession and receipt of materials irrespective whether they were obscene or not:

"It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press), . . . necessarily protects the right to receive . . . ' *Martin v. City of Struthers*, 319 US 141, 143, 87 L. Ed. 1313, 1316, 63 S. Ct. 862 (1943); see *Griswold v. Connecticut*, 381 US 479, 482, 14 L. Ed. 2d 510, 513, 85 S. Ct. 1678 (1965); *Lamont v. Postmaster General*, 381 US 301, 307-308, 14 L. Ed. 2d 398, 402, 403, 85 S. Ct. 1493 (1965) (Brennan, J., concurring); cf. *Pierce v. Society of Sisters*, 268 US 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468 (1925). *This right to receive information and ideas regardless of their social worth*, see *Winters v. New York*, 333 US 507, 510, 92 L. Ed. 840, 847, 68 S. Ct. 665 (1948), is fundamental

to our free society. Moreover in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man."

The full impact of *Stanley* will not be known for a considerable length of time. Some courts have already been called upon to expound upon the right to receive and possess privately, materials deemed obscene under various standards previously set forth by appellate courts.

The basic premise consonant with the right to receive and possess is the ability to acquire. The United States District Court for the District of Massachusetts, constituting a statutory Three Judge Court, convened to determine the extent of *Stanley* in relation to consenting adults' right to view an obscene film within an adults only motion picture theater. The plaintiff there asserted the right to exhibit the film, obscene or not, under controlled circumstances not involving *Ginzberg* pandering and not disseminated to minors nor foisted upon the public in such a manner that it would affront an individual wishing to avoid confrontation with it. The plaintiff further showed the court that the exterior of the

moving picture theater had sufficient notice of the type materials displayed leaving to the individual the choice of entering or not. That court in *Karalex v. Byrne*, 306 F. Supp. 1363 (1969), (pending decision on appeal in this Court), found that the right to receive and possess was co-extensive with the right to obtain and that, what a rich Stanley may do at home a poor Stanley may view outside his home and reported out as follows:

"The question, how far does Stanley go. Is the decision to be limited to the precise problem of 'mere private possession of obscene material,' 394 U.S. at 561, 89 S. Ct. at 1245; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth v. United States*, 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, was 'not impaired by today's holding,' and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that 'obscenity is not within the area of constitutionally protected speech or press,' 354 U.S. at 485, 77 S. Ct. at 1309, whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was 'devoid of any ideological content' was irrelevant. 394 U.S. at 566, 89 S. Ct. at 1248.

"Of greater importance, a need for affirmative proof that obscenity raises a 'clear and present danger of anti-social conduct or will probably induce its recipients to such conduct,' rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of 'public distribution.' The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful. 394 U.S. at 567, 89 S. Ct. 1243. Had the court

considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

"In recognizing that public distribution differed from private consumption, the Court in Stanley gave two examples. In thy case of public distribution, 'obscene material might fall into the hands of children *** or *** it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567, 89 S. Ct. at 1249. To these examples, which were the extent of the Court's discussion, it can be said equally with Stanley, 'No such dangers are present in this case.'

"We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of the criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. Cf. *Griswold v. Connecticut*, 1965, 381 U.S. 479, 86 S. Ct. 1678, 14 L. Ed. 2d 510. *If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.*" (Emphasis supplied)

The United States District Court, Central District of California in the matter styled *U.S. v. Thirty-Seven Photographs, et al*, 309 F. Supp. 36, (also awaiting decision by this Court), wherein a Three Judge Court dealt with a statute restricting the right of a citizen acquiring obscene material for possession by importing these materials into the United States. The plaintiff there arrived in Los Angeles from

Europe via airplane. Custom officials found photographs in his luggage and confiscated them under the statute. The plaintiff in court candidly admitted he was to incorporate these snapshots into a book for distribution.

The Court unanimously held *inter alia* that the statute would effectively deny a citizen's right to private viewing and possession of obscene materials and ruled the federal statute unconstitutional and ordered return of the photographs and stated:

"The cornerstone of the attack, of course, is *Stanley v. Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis v. Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Texas 1969).

"The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls into the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

"19 USC. Section 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

"The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland*, 380 U.S. 51 (1965) grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), '(T)he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.'

"The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent."

Thereafter the same United States District Court with a single judge sitting was presented with an identical proposition and the United States presented a Motion to Dismiss to the court under the ruling of the Three Judge Court previously cited. This matter styled *U.S. v. Four Books Entitled "Sexual Freedom,"* Civil No. 69-2328-F 2/10/70 was ordered dismissed. Dismissal was prefaced upon the adjudication that the Three Judge Court had previously made.

The United States District Court for the Northern District of Texas, Dallas Division, in *Stein v. Batchelor*, 300 F. Supp. 602, at page 606-607 dwelled upon the extent of the Stanley holding. There the court found that the Stanley doctrine implied that obscenity is fully protected and the state had an interest only in regulating the manner of public dissemination.

Text writers have expounded upon the theory also. Professor Frank I. Michelman, Harvard Law School, wrote in "*The Supreme Court, 1968 Term,s,*" *83 Harvard Law Review* 7, 147-154 (1969) of protecting the poor through the Fourteenth Amendment.

"Retreating somewhat in *Stanley*, the Court held that the First Amendment does indeed forbid a state to impose a criminal penalty merely for the knowing, private possession of obscene material. Its opinion espoused a new approach to first amendment obscenity doctrine that has wide-ranging implications.

"Writing for five members of the Court, Mr. Justice Marshall stated that private possession of obscene material is protected by the First Amendment, supplemented by a right of privacy. A purpose fundamental to the protection of free speech, he said, is the guaranty of 'the right to receive information and ideas, regardless of their social worth.'

"The 'right to receive' he went on, 'takes on an added dimension' when joined as here with the 'right to be free . . . from unwanted governmental intrusions into one's privacy.'

"In *Stanley*, however, the Court found 'little empirical evidence' indicative that obscenity and harmful conduct are usually connected. More importantly, it said that 'in the context of private consumption' the state may achieve its purpose through less restrictive alternatives. It may, for example, employ education or punishment of the deviant conduct itself. The same criticism applies to laws regulating public distribution. It is unlikely that the evidence is any greater that contact with obscenity through public distribution leads to harmful conduct. Indeed, one who peruses pornography alone in his home probably had to obtain it through public distribution in the first place. The less restrictive

alternative principle also would apply, though perhaps somewhat less forcefully, to a ban on public distribution.

...

"Interpretation of Stanley simply as a privacy decision, however, is belied by the Court's description of the privacy factor as an 'added' consideration and its formulation of the opinion in clear First Amendment terms. The principal underpinning of the opinion is really the 'right to receive' obscene material. It is that doctrinal innovation that gives the Stanley decision elasticity. The Court's concern for a 'right to receive' ideas came to light in *Martin v. City of Struthers*, relied upon by the Stanley Court. There, it served to invalidate an ordinance forbidding door-to-door distribution of handbills. Martin thus acknowledges the obvious: *that receipt is simply the last step in the process of distribution. Protection of the former requires at least some protection of the latter.* Similarly in the obscenity context, the 'right to receive information and ideas, regardless of their social worth,' should serve after Stanley to protect certain forms of public distribution as well as private possession. Surely that right may be effectively denied through a ban on all distribution of obscene material.

"So conceived, the 'right to receive' obscene material gives new meaning to the Court's distinction between private consumption and public distribution. An attribute of privacy — just as of the 'right to receive' — is the ability to control one's personal environment. *Unwanted intrusions violate one's privacy. Yet only some forms of distribution of obscene material invade that interest.* A movie theater showing a pornographic film, for example, is public in the sense that anyone may enter if he pays the price. But the movie it shows is not 'publicly' distributed in the sense of forcing unwanted obscenity on anyone.

The theater does not invade the privacy interest in freedom from unwelcome intrusion, so long as its advertising on the street is not itself obscene. In this matter, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals. So defined, it may be banned.

"Already, one federal court has taken a step in this direction. To preserve the constitutionality of a disorderly conduct statute punishing the use of profane language in any public place, the D.C. Circuit in *Williams v. District of Columbia* read into it the qualification that the Government must allege and prove that members of the public actually heard the obscene words. The *Williams* court spoke of 'verbal assault' as the necessary ingredient after *Stanley*. This opinion suggests that *Stanley* protects a person reading an obscene publication in a public place as well as his home.

"*Stanley* may, then, signal a new doctrine that would permit obscenity to be banned only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake. The essence of an obscenity offense thus would be offense. *In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will.* The presumed offensiveness of obscenity would allow the government to prohibit unwanted intrusions whereas the government is more constrained in its efforts to prohibit intrusions by, for example, political propagandists. Conceived in this way, the shape of the new obscenity law would approximate the nuisance standard embodied in the Model Penal Code provisions on lewd conduct. Obscene publication that may be banned, like conduct that is lewd would be described as that 'which he (the offender) knows is likely to be

observed (unwillingly) by others who would be affronted or alarmed.'

"The new doctrine suggested by the Stanley opinion is the product of more than a decade in which the Court has struggled with its own libertarian impulses as it battled head on with an instinctive notion that some obscenity regulation is both permissible and desirable. The emerging doctrine after Stanley may be uncertain in its own way. Mr. Justice Sutherland summarized well the necessarily contextual character of laws prohibiting offensive action. 'A nuisance,' he said, 'may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.' In the case of obscenity laws, the factor distinguishing parlors from barnyards should be the consent of all those brought into contact with the obscene material. Despite the continuing need for ad hoc resolution of conflicting forces, there is after Stanley at least hope that the lines of battle will be more aptly drawn." (Emphasis supplied).

This approach leaves to the individual citizen his basic right to choose his own way in life so long as it does not encroach upon the rights of others.

To arrive at this conclusion one must review the progress of decisions both on the federal level and on the state court level. The earlier decisions revealed a clear lack of direction leading up to *Redrup*. From *Redrup* the path was clearer but still too elusive for many courts to follow resulting in multiple reversals. The final refinement appears in *Stanley* and the decisions following it have apparently begun to delineate it even further.

The fountainhead for the definition of obscenity decided over a decade ago was *Roth v. United States*, 354 U.S. 476. The primary question there was whether obscenity was protected expression under the *First Amendment*. That Court

ruled then that it was not. The opinion held the protection was available to all ideas having even "the slightest redeeming social importance." The Court further held that sex and obscenity were not synonymous and that ceaseless vigilance was the watchword to prevent the erosion of freedoms under the Constitution. The Court rejected the older Hicklin test and substituted "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 48-489.

The result was that the lower courts as well as the Supreme Court and the state courts fought with the application of the Roth-Alberts tests. Problems rose as to "community standards", "prurient interest" and "social importance." See *United Artists Corp. v City of Dallas*, 390 U.S. 629; *Ginsburg v. U.S.*, 383 U.S. 463; *Memoirs v. Massachusetts*, 383 U.S. 413; *Jacobellis v. Ohio*, 378 U.S. 184; and *Redrup v. New York*, 386 U.S. 767 and in particular see the concurring and dissenting opinions.

Similarly, problems arose in the application of these tests to the particular materials before the various courts for adjudication. Each obscenity matter before the courts necessarily brought with it *First Amendment* problems. There was no definite and identifiable course to follow that evolved out of these multiple cases. Rather the path became even more confusing in the light of the multiple reversals based upon *Redrup*, supra. The Supreme Court then looked to *Jacobellis v. Ohio*, 378 U.S. 184 to bring about order out of chaos by requiring a determination first that the material exceeded the customary limits of candor in the description or representation of sex or nudity. Mr. Justice Brennan urged that the standard to be applied was national in scope. The final clarity set forth was that the matter must be utterly without social importance, 378 U.S. 191.

After only two years the Court was again faced with the same problems. In *Memoirs v. Massachusetts*, 383 U.S. 413, this Court held that after each of the three individual tests were applied it must also be shown that the elements have coalesced although applied independently.

That Court found that even this did not provide the ground rules sufficient to delineate what may or what may not be proscribed. Another case arose, *Redrup v. New York*, 386 U.S. 767, (actually three cases were involved, *Austin v. Kentucky*, and *Gent v. Arkansas*) which was disposed of by reversing the lower court in a per curiam opinion. The Court noted the diverse views of the individual justices in trying to determine what material was subject to proscription and in any event held the materials before the Court was protected expression and could not be proscribed by proceedings criminal or civil, *in personam* or *in rem*. It was further noted that in none of the cases was there:

"A claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 11 L. Ed. 645; cf. *Butler v. State of Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria*, 341 U.S. 622, 7, S. Ct. 920, 95 L. Ed. 1233; *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 72 S. Ct. 814, 96 L. Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31." (*Redrup v. New York*, 386 U.S. at 769).

Clearly the implication was that the Court was no longer looking at the materials in and of themselves but rather respected the right to receive and possess together with the right to disseminate under controlled circumstances. No longer was matter obscene by any test precluded from the citizens who desired to have it. The Court in referring to the older *Roth* case stated:

"It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U.S. at 486-487, 77 S. Ct., at 1309-1310. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York*, 386 U.S. 767, 799, 87 S. Ct. 1414, 1415, 18 L. Ed. 2d 515 (1967). No such dangers are present in this case." (89 S. Ct. at 1249, emphasis added).

The reference by Justice Marshall in *Stanley* to the article by Professor Emerson is of more than passing interest. In that article, various interests allegedly sought to be protected by restriction on obscene publications, are examined by the author in the light of the decision in *Roth-Alberts*. Professor Emerson's conclusion is that most of the justifications advanced for the obscenity laws are incompatible with the basic theory of freedom of expression as incorporated in the *First Amendment* and the rule of the *Roth* case is open to criticism upon these grounds. The author concludes that the only interests which could arguably justify state intervention in this area are, first, "where a shock effect is produced by forcing an "obscene" communication upon a person contrary to his wishes" or, second, "where the interest at stake is the

effect of erotic expression upon children." 72 *Yale L.J.* at 938-939.

The Supreme Court reversed multiple cases arising later from the lower courts in per curiam opinions based upon the *Redrup* holding. It would appear that there was evolving a clearer path for the Courts to follow in obscenity litigation. Consenting adults were entitled to receive materials for their private possession and perusal irrespective of whether other members of the community were so inclined. The pattern of dissemination then became the focusing feature. The thesis was advanced by lower courts that adults were entitled to receive and conversely the material had to be disseminated to them in order for the consenting adults to so receive and possess. It was in the manner of dissemination that regulation should be enforced. In the absence of dissemination to juveniles and in the absence of intrusion upon the sensibilities of an individual wishing to avoid confrontation with it, the materials should prevail and be available to those adults wishing to receive them. See for example *Grant & Wissman v. United States*, 380 F. 2d 748 (9 Cir. 1967).

On April 7, 1969, the Supreme Court in a decision of paramount importance came to grips with the problem once again and upheld the right to private possession of *First Amendment* materials irrespective of whether they were "hard-core" pornography in the matter styled *Stanley v. Georgia*, 89 S. Ct. 1243, 22 L. ed. 2d 542. Mr. Justice Marshall stated:

"We do not believe that this case can be decided simply by citing Roth.

...

"It is now well established that the Constitution respects the right to receive information and

ideas... This right to receive information and ideas regardless of their social worth... is fundamental to our free society."

There were no dissenting opinions in the *Stanley* decision.

As was stated by Mr Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479:

"... (T)he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read... without those peripheral rights the specific rights would be less secure.*" (Emphasis supplied).

One who has the constitutional right to possess "obscene" material and the right to receive it, of necessity must have the right to purchase the materials. It cannot be argued that the right to read a book or newspaper is secure and by statute preclude the sale or dissemination of the same publications. These same citizens cannot be required to obtain the materials illegally in order to lawfully possess them.

The conclusion in logic then is that, absent dissemination to juveniles contravening a statute reflecting a limited and specific government concern for juveniles and the foisting upon the sensibilities of an unwilling individual in a manner that the individual cannot avoid confrontation with it, the materials herein are protected expression and cannot be suppressed from dissemination to consenting and willing adults. The dissemination of the materials involved in the case at bar was conducted in a controlled adults only environment and in no way violated the principles set forth herein so as to justify the institution of mail block proceedings against Appellees and recipient citizens.

In further elaboration of this type of approach to proceedings for alleged enforcement of obscenity statutes, as noted previously, the United States District Court for the District of Massachusetts, in an opinion filed on November 28, 1969, by a Three Judge Court, in a case styled *Karalexis v. Byrnes*, 306 F. Supp. 1363, stated:

"We are asked to rule that this decision (*Stanley v. State of Georgia*, 1969, 394 U.S. 557) extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

* * * * *

"The Following facts appear by stipulation of counsel or otherwise. Plaintiffs (Motion picture operator) have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg v. United States*, 1966, 383 U.S. 363. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

"For the purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts Courts.

* * * * *

"The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of mere private possession of obscene material, (394 U.S. at 561); is it the high water mark of a past flood, or is it the precursor of a new one?"

* * * * *

"In recognizing the public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, 'obscene material might fall into the hands of children . . . or . . . it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, 'No such dangers are present in this case.'"

* * * * *

"We think it probable that Roth remains fully intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

The Court thereafter went on to say:

"If a rich *Stanley* can view a film, or read a book, in his home, a poorer *Stanley* should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Subsequently the United States District Court, Central District of California in the matter styled *U.S. v. Thirty-Seven Photographs*, *supra*, cited *Stanley* as authority and held the federal statute restricting importation of obscene pictures invalid as limiting private possession by precluding transportation, acquisition and importation of them. The Court there stated:

"The cornerstone of the attack, of course, is *Stanley v. Georgia*, 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis v. Byrne*, Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.C. Texas 1969).

"The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley*.

"19 U.S.C. Section 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

"The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland*, 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965), '(T)he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

"The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

"A second attack on the statute further involves *Freedman v. Maryland, supra*. Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2) the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

"In the contest of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

"We are aware of *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 89, 399 (2d Cir, 1966) which stated, '(S)pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme...' That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman, supra* at 58-59, '(T)he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period.. go to court...' We must follow *Freedman*."

Thereafter the United States District Court for the Central District of California in the matter styled *U.S. v. Four (4) Books Entitled "Sexual Freedom,"* Civil No. 69-2328-F, 2/10/70 had before it another seizure case involving *First Amendment* materials at customs. The prosecution motioned

the Court to dismiss the complaint based upon the ruling of the Three-Judge Court in *U.S. v. Thirty-Seven Photographs*. The Court granted the motion and ordered the return of the materials to the claimant.

On April 29, 1970 the United States District Court for the Eastern District of California in *U.S. v. Robert Irvine Lethe, U.S.D.C., Ed. Cal. Case No. CR-S-884* heard a case wherein the defendant was arrested and tried for mailing "nonmailable" obscene materials. One of the defenses presented was an attack upon the indictment asserting the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requested them based upon *Stanley v. Georgia*. The Court sustained his contention and found that he was entirely correct as to those counts where the attack was applicable. The Court stated:

"I turn now to defendant's substantive attack on the indictment. He asserts that the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requests them. His argument is based primarily upon *Stanley v. Georgia*, 394 U.S. 557 (1969), which held that 'the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.' 394 U.S. at 568. The right to possess, he argues, implies the right to buy or receive, and the right to buy or receive is meaningless unless someone has the right to sell or send.

"Before *Stanley*, the quick answer to defendant's argument would have been that *Roth v. United States*, 354 U.S. 476 (1957), held that obscenity was outside the protection of the First Amendment and the government could regulate its possession and distribution at will, like any other contraband. However, *Stanley* clearly indicates that Roth does not go that far:

'Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protection. Neither Roth or any other decision of this Court reaches that far. (394 U.S. at 563.)'

"The Court then proceeded to examine the constitutional implications and the governmental interests involved in the Georgia statute forbidding more private possession of obscene material.

"It is true that in *Stanley* the Court recognized the important governmental interest in regulating commercial distribution of obscene matter:

'The door barring federal and state intrusion into (the area of First Amendment rights) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' (citing Roth) Roth and the cases following it discerned such an 'important interest' in the regulation of commercial distribution of obscene material. (394 U.S. at 563-564).'

"But to say that the government has an 'important interest' in the regulation of commercial distribution is not to immunize all statutes touching commercial distribution from further judicial scrutiny. In *Stanley* itself the State sought to justify the statute on the ground that it was a necessary incident to its statutory scheme prohibiting distribution. This did not prevent the Court from weighing the governmental interests against the protections of the Constitution.

"Thus, while recognizing the government's legitimate interest in regulating distribution, I proceed to examine the constitutional implications of prohibiting

use of the mails for distribution of obscene materials to one who has requested them. I start with the proposition that the government may not legislate to control what books or films a person may possess in his house regardless of their content.

'If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).'

"If the government has no substantial interest in preventing a citizen from reading books and watching films in the privacy of his home, then clearly it can have no greater interest in preventing or prohibiting him from acquiring them. The only possible purpose in preventing him from acquiring them is to prevent him from enjoying them.

'It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive . . . (Citations) This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).'

"The governmental interest is not augmented because a person *buys* the material instead of receiving it some other way. Thus, I conclude that a person has a constitutional right to buy or receive obscene material.

"The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a

crime to sell the book to him? I think not, unless the government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying.

"There are basically only four goals which have been used to justify restrictions on dissemination of obscene material: (1) preventing crime of sexual violence, (2) protecting the society's moral fabric, (3) protecting children from exposure to obscenity, and (4) preventing 'assaults' on the sensibilities of an unwilling public. It is clear from *Stanley* that the Supreme Court does not consider either of the first two legitimate justifications for obscenity legislation:

'(I)n the face of . . . traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment . . . ' (The Constitution's) guarantee is not confined to the expression of ideas that are conventional or shared by a majority . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' *Cg. Joseph Burstyn Inc. v. Wilson*, 345 U.S. 495 . . . (1952). Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for a court to draw, if indeed such a line can be drawn at all . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally promise legislation on the desirability of controlling a person's private thoughts.

'Perhaps recognizing this, Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '(a)mong free men, the deterrents are education and punishment for violations of the law . . . ' Whitney v. California, 274 U.S. 357, 378 . . . (1927) (Brandaiss, J. concurring) . . . Given the present state of knowledge, the State may not prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.' (footnotes omitted) (394 U.S. at 565-67).

"See also *Redrup v. New York*, 386 U.S. 767 (1967). The Supreme Court has recognized the protection of children and the protection of an unwilling public from obtrusive invasions of privacy as proper governmental interests justifying obscenity laws. But neither of these can be used to justify prohibiting mailings to a requesting adult. There is no public display, and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution."

The United States District Court for the Northern District of California in the matter styled *Alan Kalker v. Lim P. Lee*, No. 51488, decided September 22, 1969, by analogy, had before it a matter involving enforcement of a postal regulation 39 C.F.R. Section 262 wherein postal authorities were permitted to detain any letter suspected of containing prohibited matter and seek authorization to open it and examine the contents if the letter was mailed from a foreign

country. If such permission was not given the postal authorities could stamp the letter "unclaimed" and return it to the sender. The contention of the Petitioner in that matter was to the effect that he would concede the right of the postal authorities to open the mail and examine the contents in line with the customs power of the federal government. He disagreed, however, with the provision permitting the postal authorities to not permit receipt of the materials but to stamp the letter unclaimed in the event permission from him was not forthcoming and thereafter to return the letter to its origin. The court held that upon this ground the postal regulation was invalid.

The principle set forth here is not a novel one. It has been applied in other fields of regulation. For example where one uses obscene language on a public sidewalk without encroaching upon the rights of others or inciting a breach of the peace he may not be criminally punished. In that case entitled *Williams v. District of Columbia*, 419 F. 2d. 638, (1969) the United States Court of Appeals, District of Columbia Circuit at page 645 the Court found that the Government had no legitimate interest in punishing anyone for uttering obscene or profane language out of the presence of anyone else. The guiding principle was that the speech could not incite a breach of the peace or inflict injury upon another by verbal assault. Yet private indulgence of obscene expression was protected.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down the Connecticut statute restricting the dissemination of contraceptive information and materials to willing adults. The Court held that the freedom of speech and press includes the right to distribute, receive and read. In essence where a willing adult sought information the state there could not place an impediment to the receipt

and use of the materials consistent with fundamental *First Amendment* freedoms. There is nothing more analogous than the thesis in the case at bar.

In *Sidney Babbitz v. McCann*, U.S.D.C. Ed. Wis. (1970) Civil No. 69-C-548, the Court found a fundamental right to receive an abortion which was prohibited by Wisconsin law. This right was fundamental and extended until such time as the embryo "quickened" in the event the act would affect the interests of another, i.e., the quickened embryo. This analogy may be factually far afield of the situation where freedom of speech and press are concerned but it does serve a purpose in that it equates with the general thesis that a citizen may constitutionally be protected in the willing receipt of those materials that do not encroach upon the rights of others.

Professor Richard A. Kane wrote an article entitled "*Stanley v. Georgia: New Directions In Obscenity Regulations?*", Vol. 48, Texas Law Rev., 646. In his article he suggests that the original *Roth* decision is a misapplication of some fundamental principles under the *First Amendment* and should be reversed. His research of case law and research authorities failed to substantiate the point that obscenity leads to crime or antisocial conduct. In his article he stated:

"While this view of *Stanley* would be the least disruptive, and undoubtedly the most popular, it requires a very selective reading of the opinion. In the first place, the Stein view would seem to be inconsistent with *Stanley's* guarantee of the right merely to possess obscene material. If an adult has a constitutional right to possess and read obscene material, he should have the right to procure that material. If one person has the right to procure, some other person must have the right to disseminate. The prohibition of sales would most certainly take the right to possess away completely.

"More importantly, allowing conviction for sales in all circumstances would be inconsistent with the danger approach to obscenity regulation taken by the Court in *Stanley*. If the Court is going to require that dangers be shown to allow regulation, it should not permit regulation when no dangers are shown. Although the Court states that dangers might be present in cases of commercial distribution, it is equally possible that they might not be present. Therefore, any statute prohibiting the sales of obscene materials should be limited to cases in which dangers have been shown to be present.

...

V. Conclusion

"Although the *Stanley* opinion contains all the elements necessary for a repudiation of the two-level theory and the enunciation of a straightforward danger test for speech relating to sex, the Court failed expressly to reject the doctrine. Its statement that *Roth* is still good law will keep the doctrine alive until the Court officially announces its demise.

"The time has come for the Court to reject the theory explicitly. It has not worked in practice and has become so honeycombed with exceptions and conflicting opinions that its basic rationale, the blanket exclusion of certain classes of speech from the first amendment, has all but disappeared."

In the case note of the *California Law Review* entitled "*Constitutional Law—First Amendment: The New Metaphysics of the Law of Obscenity. Stanley v. Georgia*, (U.S. 1969)." Vol. 57: Cal. L. Rev. 1257 is contained a comprehensive review of *Stanley*. The article contains four parts, 1) *PreStanley* doctrine; 2) the impact of *Stanley* upon the old doctrines; 3) analysis of arguments to justify censorship; and 4) obscenity distribution. After careful review

of the evolution of obscenity doctrines by the courts and the argument in support of censorship the author speaks on the problem of obscenity distribution following *Stanley*. Beginning at page 1277 he states:

"Thus, while protection of children and avoidance of obtrusive public displays of obscenity have received clear endorsement, the Court has ruled that the State's interest in preventing sex crimes and ensuring the citizenry's good moral character are not valid interests on which to base obscenity regulations. In view of the fact that overbreadth is fatal to legislation in the first amendment area, the laws regulating obscene speech must be drawn as narrowly as possible in furtherance of the acceptable goals. It follows, therefore, that only statutes carefully (sic) drafted to protect children and to prevent affronts to the public can withstand the constitutional test. General public distribution (commercial sales) ordinarily involves neither the display of obscenity in such a manner that the public cannot avoid seeing it and being offended by it, nor sales to minors. Each of these evils may be regulated by far narrower prohibitions than a general prohibition on sales.

"Another aspect of the *Stanley* opinion also suggests that blanket restrictions on distribution are unconstitutional. The Court focused on the rights of the would-be purchaser of erotic material, stressing the right of the individual to have access to all material, to 'read or observe what he pleased,' and to 'satisfy his intellectual and emotional needs.' The Court said that these rights were 'fundamental to our scheme of individual liberty,' and it concluded that 'If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.'

"It would seem naive to assume that right of the individual considered so basic can constitutionally be

circumvented by restrictions on the distributor. Commercial activity per se is no ground for regulation, and the obvious purpose of laws prohibiting sales is to prevent the potential recipients from obtaining the material. But it is exactly such access which *Stanley* holds to be so central a freedom. By prohibiting sale of obscene material, the State is 'telling a man . . . what books he may read or what films he may watch.' The freedom to choose what moral standards to adopt and what sort of printed or filmed material to read or observe is the essence of what *Stanley* guarantees to an individual—so long as offensive public display and exposure of minors are avoided. But laws prohibiting non-obtrusive sale of such material to adults will vitiate the rights protected by this commitment.

"The *Stanley* Court's emphasis on the right to privacy is another factor which makes likely a holding that general restrictions on sales are unconstitutional. The rights in jeopardy here are similar to those the Court considered in *Griswold v. Connecticut*, where the Supreme Court reversed the conviction of birth control clinic officials under a State anti-contraception statute. In *Griswold* the Court reasoned that the zone of marital privacy protected by the Constitution guaranteed to the couples receiving information and devices from the clinic the right to be free to choose whether or not to employ contraception without coercive foreclosure of that choice by the State. Since the Court states in *Stanley* that an individual's privacy includes his right to choose what he will read or observe, the parallel to *Griswold* is clear. Prohibition of sales of erotic material violates the individual's right to privacy by denying him the opportunity to make these choices. When this reasoning is combined with the first amendment right of access to all expression and the value of freedom of thought, it seems clear that general prohibitions on sales violate the Constitution."

And of course we must always keep in the forefront of our minds the actual wording of the *First Amendment to the Constitution of the United States*:

"Congress shall make no law . . . abridging freedom of speech, or of the press." (Emphasis supplied).

Under the rationale suggested by the cases quoted herein, the challenged material before this Court in the premises cannot or should not be declared obscene and without the protection of the *First Amendment* unless it can be shown that the defendant in his dissemination abused and intruded on the rights of others.

In one of the most recent pronouncements of this approach, a three judge court unanimously held, in the case styled *U.S. v. Various Articles of Obscene Merchandise*, (Schedule No. 495), U.S. D.C., S.D. N.Y., Case No. 68-Civ.-2971 (decided 6/8/70), that a citizen may constitutionally obtain and receive "obscene" material through importation. The Court held that the customs statute was unconstitutional in its application wherever a citizen desired to receive these materials whether obscene or not.

Another recent decision validating this principle is found in United States District Court for the Central District of California entitled *U.S. v. Reidel*, Criminal No. 8458-HP, Pregerson, J., decided June 8, 1970 (appeal to U.S. Supreme Court filed July 8, 1970). The government agreed that there was no evidence of unsolicited receipt of the obscene materials and no receipt to juveniles but only to consenting adults. The Court stated:

"It would seem to me, anyway, that if a person has the right to receive and possess this material, then someone must have the right to deliver it to him.

This is basically the thought that was expressed in *Karalex v. Byrne*, 306 F. Supp. 1363, a 1969 Massachusetts case, District Court in Massachusetts.

"So it would be my conclusion that where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults, there is no valid governmental interest that I can see that would justify a criminal presentation for distributing this material, and I would therefore, of course, go along with Judge MacBride in the case of *United States v. Lethe*, decided by him on April 29, 1970, Eastern District of California. So this court is, therefore, going to rule that this particular prosecution that is now before it under 18 U.S.C., Section 1461, runs afoul of the First and Fourteenth Amendments. On that basis the motion to dismiss is granted.

"Because the court has ruled that the defendant may not be prosecuted for mailing this obscene material to requesting adult addressees, the court need not pass on the other constitutional questions and need not pass on this matter of requirement of an adversary hearing."

Consequently, under the leading legal theory nationally prevalent, the material before the Court is not obscene in the constitutional sense as a matter of law. Therefore erection of a mail block preventing the mailing and receipt of mail matter between consenting adults is invalid.

II.

Section 4006 constitutes an invalid prior restraint and creates a chilling effect upon First Amendment Freedoms.

- A. The procedural requirements of *Freedman v. Maryland*, 380 U.S. 51 are not met in Section 4006.

Appellant views *Freedman* in the context that a movie censorship scheme differs completely from a mail block. In comparison we find that movie censoring and mail censoring are strikingly similar even though they are separate and distinct in manner of dissemination.

The *Freedman* movie censorship scheme required the prior submission of films to a state agency for licensing prior to dissemination. A license refusal forestalled any showing of the rejected film. But in censorship of the mails the parties using mail carriage delivers the material to the federal government who in turn must carry and deliver the items and honor payment of instruments drawn between the parties. When, during the time of carriage, the postal authorities deem the material obscene they may simply invoke an administrative proceeding whereby they can stamp as unlawful mail matter between the parties and return to the sender and dishonor postal instruments. When administrative proceedings are commenced we find the prosecutorial parties, the quasi-judicial authorities and the parties seeking such relief all within the framework of the organization seeking to censor the mails. Upon instituting this procedure mail may be impounded by a collateral order from a United States District Court merely upon a showing of "probable cause." If the District Court denies the injunctive relief it in no way bars the departmental proceedings.

Effectively then this is a prior restraint for there has been no judicial determination removing the material from constitutional protection. In fact there need be none at all for if the parties wishing to utilize the mails do not seek judicial relief on their own no judicial scrutiny will be had.

Upon institution of administrative proceedings what is the period within which a final determination must be issued? The statute itself fails to set forth any requirements. When we review the administrative regulations we find they are "unduly cumbersome and time-consuming procedures", *Shuttlesworth v. Birmingham*, 394 U.S. 147, 162. A hearing must be provided,

"(W)henever practicable. . . within 30 days of the date of the notice"

of the hearing, 39 C.F.R., Section 952.7.

Following this hearing, the Postal Examiner is required to issue his findings with

"all due speed"

39 C.F.R., Section 952.4. If an adverse decision is given, the one seeking the use of the mails must himself seek an appeal to exhaust all administrative remedies. This appeal must be taken within 15 days of the Examiner's decision, 39 C.F.R., Section 952.25.

On appeal there is no limitation on when the decision must be given. Moreover, 39 C.F. R. Section 952.27 permits an Appellant under the postal laws to file a motion for reconsideration of the final departmental decision. In the interim all of the Appellee's incoming mail may be detained under an order, if obtained under Section 4007, merely upon

the showing of "probable cause." At this point the mail recipient must then apply to the courts for any relief that may be forthcoming, with the burden upon him to show that the administrative decision was erroneous. Needless to say the Court in *Freedman v. Maryland*, *supra*, did not envision such a protracted delay in the vindication of *First Amendment* rights.

Appellant makes a distinction between a board created for the express purpose of censoring versus the Post Office Department that was not created for such a purpose. Logic and facts in the case at bar will show that irrespective of the motivation creating an agency, the agency may embark upon the duties of a censor. This is amply shown in the case at bar. Were it not for the Postal authorities embarking upon the course of attempting to set up a mail block based upon the alleged obscenity of a named publication this matter would not now be before this Court. These same authorities had another route of procedure in instituting criminal sanctions under *18 U.S.C. 1461* which would have provided a prompt judicial determination of the violation in the atmosphere of an adversary hearing. These same authorities decided to forego such a hearing and proceed in the manner of a censor and attempt to set up a complete mail block. In this manner the Postal authorities may in and of themselves determine what is proscribable and inhibit if not prevent the recipient's use of the mails, irrespective whether the recipient has ever been convicted of a crime.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative

decision or in combination with a sweeping order under *Section 4007*, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"...the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

B. Orders issued under Authority of Section 4006 are constitutionally invalid.

The fraud sought to be condemned in *Section 4005* cannot be equated with regulation of ideological content sought under *Section 4006*. A *Section 4006* prohibitory order provides a complete mail block pending a showing to the contrary.

Under both the administrative procedure and the judicial procedure in aid of the *4006* enforcement, any denial of receipt of mail or delivery thereof, by necessity, also prohibits the receipt of mail items unconnected with the purportedly obscene materials involved in the controversy without the affirmative duty upon the intended recipient to seek the opening of and the examination of the materials and the showing to the postal authorities that the materials are clearly unconnected with the allegedly unlawful activity.

This Court has at various times had to rule upon actions taken under the postal regulations. A case of similar import to the one at bar was heard and decided and styled, *Lamont v. Postmaster General*, 381 U.S. 301, wherein the issue was one involving detention of mail that was deemed to be communist political propaganda. It was found that the detention once enacted required action upon the recipient's part in order to receive such detained mail. This requirement was found to be unconstitutional and repugnant to the safeguards of the *First Amendment*. Mr. Justice Douglas expressing the views of seven members of the Court stated variously:

"We conclude that the Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437, 65 L ed 704, 720, 41 S. Ct. 352 (dissenting): 'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'"

and Note 3 thereunder:

"3. 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.' *Pike v. Walker*, 73 App DC 289, 291, 121 F2d 37, 39. And see Gellhorn, *Individual Freedom and Governmental Restraints*, p. 8 et seq. (1956)."

The Court then continued stating the limitations upon Congress by virtue of the *First Amendment*:

"Here the Congress — expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 90 L ed 586, 66 S. Ct. 456, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage.

...

"The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."

Mr. Justice Brennan with Mr. Justice Goldberg in a separate concurring opinion enunciated:

"However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.' *Martin v. City of Struthers*, 319 U.S. 141, 143, 87 L ed 1313, 1316, 63 S. Ct. 862. Since the decisions today uphold this contention, I join the Court's opinion.

"It is true that the First Amendment contains no specific guarantee of access to publications. However,

the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497...

...

"I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

...

"But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, e.g., *Freedman v. Maryland*, 380 U.S. 51.

...

"...the statute under consideration, on the other hand, impedes delivery even to a willing addressee.

...

"If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights."

C. Section 4006 orders chill First Amendment freedoms

The Appellant argues that Congress is "entitled to chill" dissemination of *First Amendment* materials. They also argue that these procedures are relatively mild in comparison to criminal sanctions.

A reading of *Article I* of the *Constitution of the United States* reveals no such congressional powers. Whereas the *First Amendment* thereunder places a plain and concise prohibition against the exercise of such powers.

With regard to criminal sanctions, it may well be that their method is preferable. For in that type proceeding the mail blocks are not imposed and to properly convict of an offense the prosecution must bear the burden of proof before a judicial body beyond a reasonable doubt. Also the common law principle of strict construction and admissibility of evidence would apply. Yet this is not so in these administrative proceedings.

III.

Section 4007 and relief authorized thereunder is repugnant to and invalid under the *First Amendment* to the *Constitution of the United States*.

By like instance, in seeking an *ex parte* order under *Section 4007*, the postal authorities attempted to foreclose Appellee's unfettered receipt of all mail by a postal mail block. It would take a hardy individual to forward mail knowing that any and all replies would be held under a court order until each item was determined to clearly not be connected with the purportedly obscene mailings. Such an order may be issued *ex parte* since "probable cause" is all the Postmaster General must show and a postal block may be effected without first focusing on and determining the issue of obscenity *vel non* of the challenged material. Risk of delay in the final judicial determination of the allegedly obscene mailings is inherently built-in to the procedures provided for under *Sections 4006 and 4007*.

This Court, in numerous cases, has repeatedly condemned invalid "prior restraints" upon the free exercise of those fundamental freedoms guaranteed under the *First Amendment*. These cases clearly support the proposition that "prior restraints" of the type sought here by the Postmaster General are constitutionally invalid for lack of proper procedural safeguards in the sensitive area of freedom of expression.

As was stated in *Near v. Minnesota*, 283 U.S. 697, with regard to the imposition of a "prior restraint" on the freedom of expression:

"...the protection even as to previous restraint is not absolutely unlimited."

But in *Batam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that:

"any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity..."

In *Speiser v. Randall*, 357 U.S. 513 (1958), it was stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated... is finally drawn. The separation of legitimate from illegitimate speech calls for... sensitive tools..."

The "sensitive tools" referred to in *Speiser, supra*, have been determined by this Court to mean that in the protected area of freedom of expression the administrative officials and/or law enforcement officials may impose a prior restraint or temporary suppression only if they design and comply with procedural safeguards which obviate the dangers inherent in a

ensorship system. The procedural safeguards must be patterned in such a manner as to assure that the burden of promptly instituting adversary judicial proceedings and the burden of showing the expression is unprotected rest upon those seeking to restrain or suppress the expression and to also assure a prompt final judicial decision on the merits within the shortest fixed period compatible with sound judicial determination.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held the administrative procedural scheme of the Maryland Motion-picture censorship statute constituted an invalid "prior restraint" and violated the constitutional guarantee of freedom of expression because:

"First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the Section 2 requirement of prior submission of films to the Board an invalid previous restraint."

The reasoning underlying the necessity for a prior adversary judicial proceeding was held to be:

"The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial

determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, *supra*; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L ed 2d 809, 84 S. Ct. 1723; *Marcus v. Search Warrant*, *supra*; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 8 L ed 2d 639, 663, 664, 82 S. Ct. 1432."

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), this Court expressly condemned the seizure of allegedly obscene publications as an invalid "prior restraint" by stating:

"there is no doubt that an effective restraint indeed the most effective restraint possible was imposed prior to the hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the news stands and the premises of the wholesale distributor . . . the public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to out-wit the police by obtaining and selling other copies before they in turn could be seized . . . a distributor may have every reason to believe that a publication is constitutionally protected and will be so held after a judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes from him . . . mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

In a recent pronouncement by this Court involving *First Amendment* rights and "prior restraint," *Carroll v. President and Commissioners of Princess Anne, et al*, 21 L ed. 2d 325 (1968), Justice Fortas, expressing the views of eight (8) members of the Court, set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

"It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or

permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

...

"Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.

"Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceedings, cannot be sustained. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 6 L Ed 2d 1127, 1135, 81 S. Ct. 1708 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L Ed 2d 809, 84 S. Ct. 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for '*not first affording* (the seller of the books) *an adversary hearing*' (emphasis supplied) 378 U.S. at 211, 12 L Ed 2d at 813."

...

"...there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

...

"In the absence of evidence and argument offered by both sides and of their participation in the

formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication."

It was in the case styled, *Marcus v. Search Warrant*, *supra*, that this Court enunciated the principle that:

"...(U)nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech."

By analogy, it appears equally clear that the Federal Government may not impose similar procedures that violate the constitutional guarantee of freedom of expression and the constitutional right to use the mail by virtue of the Due Process Clause of the *Fifth Amendment of the Constitution of the United States*. See *Manual Enterprises, Inc., v. Day*, 370 U.S. 478, 518-519; *Lamont v. Postmaster General*, 381 U.S. 301.

Assuming, arguendo, that the Postmaster General was expressly authorized by Congress under *Sections 4006 and 4007* to impose such restraints and secure a temporary restraining order and a preliminary injunction in Federal District Court, still there would remain grave constitutional doubts as to the validity of such a procedure which does not provide for all the fundamental safeguards that this Court has consistently stated is required in the sensitive area of freedom of expression. The imposition of the restraints in the instant case by the Postmaster General, prior to a judicially superintended adversary proceeding, must be interpreted, in the light of this Court's rulings, to be invalid. These invalid "prior restraints" have had a "chilling effect" upon the Appellee's unfettered exercise of his freedom of expression as

well as his "open right" to use of the mails, thereby inducing self-censorship.

The Court in *Lamont v. Postmaster General*, 381 U.S. 301 quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But when habit and law combine to exclude every other (means of transportation of mail) it seems to me that

the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . ."

The United States Court of Appeals for the Fifth Circuit in the matter entitled *Hiatt v. U.S.*, 415 F. 2d. 664, reversed the United States District Court for the Western District of Texas wherein the Appellant there was convicted of using the mails to solicit business in procuring foreign divorces. The Court there reviewed the history of power granted to the postal authorities in regulating the use of the mails. It then stated the restrictions upon the use of such power together with the rejection of the proposition that the use of the mails was a privilege and could be denied or restricted at the option of the postal authorities. The court stated:

"However, it is one thing to say, as the cases hold, that a power of Congress may legitimately be used to protect the public health, safety, welfare, or morals, and quite a different thing to say, as appellee apparently says, that its use of police power purposes automatically overrides the specific limitations on Congressional power that are contained in the Bill of Rights. Admittedly, the freedom of speech is not absolute; but neither may the powers of Congress,

even though delegated by the Constitution, be regarded as absolute, since they would obliterate the first amendment if asserted to their logical extreme. Thus both the commerce power and the tax power have been held to be circumscribed by the first amendment. See *Red Lion Broadcasting Co. v. FCC*, 1969, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371; *Murdock v. Pennsylvania*, 1943, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1291. Similarly, regulation of speech through the postal power, although it is authorized where necessary to effect legitimate legislative ends, is to be tested against the first amendment.

...

"We find that the trend of cases, and especially the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits. The need for Congress to respect the provisions of the Bill of Rights in the exercise of the postal power has long been emphasized.

...

"The now-famous Holmes dissent in *Milwaukee Social Democratic Pub. Co.* states that '(t)he United States may give up the post office when it sees fit, but while it carries it on the use of mails is almost as much a part of free speech as the right to use our tongues.' In another dissent, in the *Roth* case, Mr. Justice Harlan wrote: 'The hoary dogma of *Ex parte Jackson** * * and *Public Clearing House v. Coyne** * * that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated.' In *Roth*, if not in *Milwaukee*, the majority clearly agreed, because it discussed at length the question whether obscene materials sent through the mail constituted protected speech, an inquiry that would have been meaningless had the Court subscribed to the privilege doctrine."

Another infirmity in the statutory enactment of *Section 4007* is the vice of a "denial of equal protection of the laws." Under Sub-section (b), a provision that permits and specifies certain exempt publishers and their agents, the Appellee is separated from this arbitrary classification.

"(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers."

While it is true that the *Fourteenth Amendment* to the *Constitution of the United States*, which contains a specific provision against such laws enacted by the several states, does not apply to the federal government, the government is precluded from depriving a citizen of life, liberty or property, without due process of law under the *Fifth Amendment*. The writers of the federal Constitution saw fit to enumerate certain powers of Congress. However, many contained specific directions that the authority must be applied uniformly, i.e., "Duties, Imports and Excises," "Naturalization," "Bankruptcies", etc. When applying this principle together with reading the four corners of the Constitution it can readily be seen that when the *First Amendment* was written it was meant not only to prevent Congress from denying freedom of speech and press to all citizens but similarly Congress was precluded from denying the freedom to some of the citizens and exempting others from the prohibition. Under this exemption a publisher of materials holding a second class matter classification will not be subjected to a *4007* as Appellee has been.

Although much of the problem involving the denial of "equal protection" has arisen from state proceedings the principles are applicable here in the case at bar. This Court

stated the problem of such a denial in *McLaughlin v. Florida*, 379 U.S. 184:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

The United States Supreme Court in *Yick Wo v. Hopkins*, 30 L. ed. 220 at page 225 delineated much of the protection afforded citizens wherein the Court stated at page 225, reaffirming its prior decisions:

"...in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

...

"...undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater

burdens should be laid upon one than are laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses . . . Class legislation, discriminating against some and favoring others, is prohibited."

CONCLUSION

In summary, Appellee has, on the basis of the applicable statutes and cases cited and represented to the Court in the premises, summarized the existing law on the issues before the Court. This, together with the actions of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control, in seeking to suppress from the public material presumptively protected under the *First Amendment* to the *Constitution of the United States* and conjunctively to establish a mail block restricting the right of Appellee to the use of the mails in receipt and delivery of mail and postal money orders, has effectively established an unlawful "prior restraint" creating a "chilling effect" upon and a denial of Appellee's freedoms guaranteed by virtue of the *First Amendment* to the federal *Constitution*, all of which may occur without a prior judicially superintended adversary hearing.

Sections 4006 and 4007 of Title 39 are repugnant to the provisions of the *First Amendment* in that they permit the Postmaster General and those acting under his authority and control to act as a censor by permitting an unlawful mail block and thereby denying Appellee those freedoms guaranteed by the *First Amendment* to the *Constitution of the United States*. And further, that there are no standards or guidelines to restrict the administrative officials in their action and therefore sweep within their purview presumptively protected *First Amendment* material of Appellee's. As cited

herein, *Section 4007* is further void as ancillary to *Section 4006* in that it creates an unconstitutional exemption denying Appellee the equal protection as well as application of the laws. This is all the more critical in the exercise of Appellee's *First Amendment* freedoms.

This case reveals a fundamental aspect of the collision between governmental police powers and the individual citizens freedom to choose, obtain and possess. *First Amendment* materials whether obscene *vel non* should not be proscribed in the absence of dissemination to juveniles and being foisted upon an unwilling individual or placed in front of the public by methods constituting "pandering." This freedom is empty without the correlative right to obtain these materials by lawful and legitimate means.

For the foregoing reasons, the judgments of the District Court should be affirmed.

Respectfully submitted,

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September, 1970.

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IN THE
Supreme Court of the United States

October Term, 1970

No. 55

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE
UNITED STATES, and EVERETT T. CARPENTER, POST-
MASTER OF THE CITY OF LOS ANGELES, STATE OF
CALIFORNIA,

Appellants,

vs.

TONY RIZZI, dba THE MAIL BOX,

Appellee.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR THE APPELLEE.

Question Presented.

Whether 39 U.S.C. §4006, on its face and as construed and applied, violates the free speech and press, due process, equal protection, and jury provisions of the First, Fifth, Sixth and Seventh Amendments.

Statement.

The administrative proceedings were initiated on November 1, 1968, by the filing of a complaint signed by an Assistant General Counsel, Mailability Division, Post Office Department. (Brief for Appellants, Appendix, pp. 47-48). The complaint alleged that the said Assistant General Counsel had "probable cause to be-

lieve" that the appellee was conducting through the mails an enterprise in violation of 39 U.S.C. §4006. In support of that belief, the said Assistant General Counsel alleged, in the language of the statute, that appellee was obtaining remittances of money through the mails for "obscene" magazines and giving information where such matter could be obtained. Attached to the complaint were copies of the circulars allegedly giving such information. The alleged "obscene" publications were: "Me", "Gigi", "Susy", "Match", "Bunny", "Golden Girls" and "Girl Friend".

On November 18, 1968, the appellee filed its answer to the foregoing complaint. The general allegations of the complaint were denied, and appellee concurrently moved to dismiss the complaint upon the grounds that the complaint failed to state a violation of the statute 39 U.S.C. §4006, that the proceedings violated appellee's rights under the First and Fifth Amendments, and that the seven magazines against which the complaint was brought were not obscene and were entitled to constitutional protection under the First Amendment and the interpretative decisions of the Court. On November 22, 1968, the complainant filed its reply and urged the denial of appellee's motion to dismiss and requested an order striking portions of appellee's pleading. On November 26, 1968, the Judicial Officer denied appellee's motion to dismiss and the complainant's cross motion to strike. The Judicial Officer ruled that Postal Manual §821.331(b) deprived him of the authority "to determine the constitutionality of statutes". (*Ibid.*, pp. 45-46).

The administrative hearing began on December 3, 1968, and was concluded on December 5, 1968. The

Judicial Officer reserved decision pending submission of proposed findings of fact and memorandum of law by the parties. It was provided that such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Post Office. The final volume of the reporter's transcript was delivered to counsel for the Post Office December 18, 1968. The proposed findings of fact, proposed conclusions of law, and memorandum of law were filed by the Post Office Department on December 23, 1968. Appellee's papers were filed on December 28, 1968. (*Ibid.*, p. 46).

It should be noted that the postal inspector who testified at the administrative hearing stated that "he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return". (*Ibid.*, p. 53). The Judicial Officer described the dominant theme of the magazines, taken as a whole, as "largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera". (*Ibid.*, p. 55). Federal and state rulings holding comparable material to be entitled to constitutional protection were all dismissed by the Judicial Officer as not "binding". (*Ibid.*, pp. 58-60). The conclusion of the Judicial Officer was that the magazines were "obscene, and therefore do not constitute constitutionally protected expression" (*Ibid.*, p. 62); that appellee was attempting to obtain remittances of money through the mail for the seven magazines so found to be obscene; that appellee was depositing in the mail information as to where, how, and from whom the addressee may obtain magazines which are obscene; and that such

activities constituted a violation of the provisions of 39 U.S.C. §4006.

On December 31, 1968, the Judicial Officer rendered his departmental decision, as aforesaid, and an order issued from the Judicial Officer to the Postmaster in North Hollywood, California, directing him to hold all mail, whether registered or not, which should arrive at his office directed to appellee, except for so much as could be identified on the face of the wrapper as not relating "to the unlawful activity". The California Postmaster was directed to hold all mail not so identified for 24 hours after its receipt, during which time appellee was to have the right to examine the mail so held "at a reasonable time" in the presence of the Postmaster or an employee designated by him, and appellee was to receive such mail as was not connected with the unlawful activity. The California Postmaster was also directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail returned to the sender. Where there was nothing to identify the sender of such mail, it was to be sent to the appropriate dead letter branch. (*Ibid.*, pp. 65-66). Some year and one-half later, on July 6, 1970, a new order was sent to the North Hollywood Postmaster which purported to limit the effect of the order to the particular seven magazines involved in the proceedings and specified that mail which appeared to be unconnected with the activity covered by the order should be delivered to appellee. (*Ibid.*, pp. 67-71).

On January 7, 1969, appellee filed a complaint for injunction and declaratory relief to restrain appellants from interfering with appellee's mail (A. 3). The com-

plaint alleged that appellee was engaged in distributing by mail publications, all of which were protected by the free speech and press provisions of the First Amendment. It was alleged that the order of the Judicial Officer was invalid and void because the findings that the magazines in question were obscene were unsupported by any legal evidence; were arbitrary, capricious, an abuse of discretion, and not in accordance with law; that the standards used by the Judicial Officer were contrary to those enunciated by the Supreme Court; that the conclusion of obscenity was contrary to law and unsupported by any legal evidence; and that the witnesses upon whom the Judicial Officer relied were not qualified (A. 5-6).

The complaint also alleged that the statute, 39 U.S.C. §4006, on its face and as construed and applied, violated rights guaranteed to appellee under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments. It was alleged that the statute permitted the Post Office Department to impose a prior restraint upon the circulation of the press without assuring a judicial determination in an adversary hearing within a specified brief time limit. The statute, it was alleged, provides no assurance of prompt judicial determination, nor does the statute require the Post Office Department to initiate court proceedings and to bear the burden of proof in such court proceedings. It was further alleged that the statute arbitrarily and capriciously authorized an administrative agency to suppress material as obscene without the protection of a judicial proceeding, the right to a jury trial, requirement of proof of the essential elements of obscenity, including

scienter, and all the other protections required in a judicial proceeding.

The complaint further alleged that the statute, by reason of the vagueness and ambiguity of its language, lack of ascertainable standards, and omission of any requirement of *scienter*, vested unfettered discretion in the administrative agency to suppress speech and press as allegedly obscene. The statute permits the Post Office Department, it was alleged, to engage in invidious discrimination between material which the Department deems obscene for subjective reasons and other comparable material held constitutionally protected by the courts or granted second-class mailing privileges (A. 6-8). The complaint prayed for a declaration that the statute, on its face and as applied, for all the aforesaid reasons was unconstitutional, for injunctive relief, and for the convening of a three-judge court in accordance with 28 U.S.C. §§2282, 2284 (A. 8-10).

The matter came on for hearing before the three-judge court on April 10, 1969 (A. 19-20), and the memorandum opinion and order of the court was rendered on June 10, 1969 (A. 21-26). The court held that the statute authorized the Postmaster General, after an administrative hearing, to decide whether mailed matter was obscene and further authorized the Postmaster General to impose a mail block against the sender of such matter following the determination that the matter was obscene. The burden of seeking judicial review was placed on the person against whom the mail block had been imposed. The court held that the statute was unconstitutional on its face because it failed to meet the requirements of *Freedman v. Maryland*, 380 U.S. 51. In view of the ruling of the court,

the remaining contentions of the parties were not considered and the court did not pass upon the nature of the materials claimed to be the subject of the administrative hearing. The findings of fact and conclusions of law were filed August 1, 1969. (A. 23-26). The judgment requiring the appellants to vacate the order of the Judicial Officer and to deliver to appellee all mail was also filed on August 1, 1969. (A. 28-29). On August 13, 1969, appellants moved for a stay of the judgment pending appeal. (A. 31-39). On August 20, 1969, the district court made its order staying the judgment until September 10, 1969. (A. 41). On September 2, 1969, appellants filed their notice of appeal. (A. 43). On September 26, 1969, the district court stayed the judgment until it became final after appeal. (A. 45-48). Probable jurisdiction was noted by the Court on March 2, 1970. (A. 48).

Summary of Argument.

1. 39 U.S.C. §4006 is clearly unconstitutional on its face. The statute permits administrative censorship without any provision for judicial superintendence. The burden is placed upon the publisher or distributor of the publications to go to court, and no time limits are imposed between the administrative agency's first consideration of the material and final judicial determination.

Prior restraint in the form of administrative censorship under the statute is particularly obnoxious to the guarantee of freedom of speech and press under the circumstances herein. The publications found "obscene" by the administrative official were solicited by an employee of the Post Office Department. The letters

containing orders and remittances come plainly from persons willing to receive the publications. Despite all this, a judicial officer of the Post Office Department has made the decision that the material will not be sent through the mails to those who are willing to receive it. The constitutional standards and criteria enunciated in *Freedman v. Maryland* and *Rowan v. United States Post Office Department* are contravened by the statute.

2. The arguments of the government ignore modern history and current constitutional standards. The validity of an unfettered power of censorship by the Post Office Department has constantly been questioned by the courts and by the text writers. Reliance upon the older fraud cases like *Public Clearing House v. Coyne* and *Donaldson v. Read Magazine* is misplaced. We do not deal here with fraudulent schemes and devices or other unlawful conduct. We are concerned here with a governmental activity which directly affects the exercise of freedoms of speech and press. Congress may not restrict the circulation of any publication which is not obscene. The regulation of obscenity requires the most rigorous procedural safeguards to ensure the protection of freedom of expression.

The notion that Congress, in establishing a postal service, may annex such conditions to it as it chooses is no longer accepted judicial doctrine. A postal statute which affects expression must be tested against the demands of the First Amendment. In addition, the older fraud decisions do not reflect the developing constitutional standards affecting censorship of "obscenity". The teaching of the cases of the Court in the present era is that only a judicial determination

in an adversary proceeding ensures the necessary sensitivity to freedom of expression, and only a procedure requiring a judicial determination suffices to impose a valid final restraint.

39 U.S.C. §4006 permits censorship by an administrative official, without any judicial determination prior to or following final restraint. No procedural safeguards of any kind for the protection of nonobscene material are contained in the statute. The provisions of the statute are plainly overbroad, and the statute stands as a pervasive threat to the exercise of freedoms of speech and press inherent in its very existence.

3. The attempts by the government to distinguish *Freedman v. Maryland*, *Lamont v. Postmaster General*, and *Stanley v. Georgia* are fruitless. The very initiation of the administrative proceedings induces a self-censorship and restrictions upon the public's access to speech and press which the Post Office could not constitutionally suppress directly. The postal regulations governing hearings under §4006 do not provide for speedy determinations and, indeed, in the case herein, the time between the initiation of the administrative proceedings and the final departmental decision and order was two months. Moreover, neither the statute nor the regulations make any provision for judicial superintendence, either during the proceedings or subsequent to the rendition of the final order by the administrative official. The government frankly concedes that the "burden of seeking review is on the person subject to the order".

With respect to *Stanley v. Georgia*, the government admits that if the decision be read as holding that

consensual adult access to obscene materials is protected from governmental interference, then the use of the mails, which is inherently private and ordinarily consensual, is protected from government regulation. The government argues, however, that *Stanley* did not confer upon a willing person any right to receive obscene materials. It is submitted that the decision in *Stanley* emphasizes that the assertion of a governmental interest in dealing with the problem of obscenity cannot, in every context, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this court reaches that far." The Court in *Stanley* stated that freedom of speech and press necessarily protects the right to receive information and ideas, and that right includes the right to receive information and ideas regardless of their social worth. In *Stanley*, the Court could find no countervailing state interest justifying restriction of the fundamental right of an adult to receive alleged obscene material. The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to evade the privacy or sensibilities of the general public, the Court held, are not present in the context of private consumption of ideas and information. Contrary to the government's position, there appears to be uniformity among the legal commentators in their view that the elimination of adult censorship has sound doctrinal support, is constitutionally required, and is socially desirable.

Additionally, the claim by the government that the statute does not offend the principles in *Lamont v. Postmaster General* also is tenuous. The interception of mail addressed to a publisher or distributor is con-

duct which touches basic freedoms. To compel a publisher or distributor to go to a designated Post Office, examine his mail in the presence of postal employees, and select that which is "not connected with the unlawful activity" is an unconstitutional abridgement of First Amendment rights. The statute here, which permits this type of detention, deprives not only the publisher and distributor of their constitutional rights, but also deprives the senders of the letters of similar rights.

4. It is plain that the government is unable to support the constitutional validity of §4006 in the light of the principles enunciated in *Freedman*, *Stanley*, *Lamont* and *Rowan*, the last decision being one left unmentioned in the government's brief. The government is therefore compelled to request the Court to rewrite the statute. The difficulty with the government's position in this regard is, first, the general considerations which militate against the assumption of legislative functions by the judiciary and, second, the fact that the suggested judicial amendment to the statute offered by the government will not cure the constitutional defects. The decisions in *Aptheker* and *Robel* indicate the Court's refusal to engage in judicial rewriting of overbroad statutes which impinge upon First Amendment rights.

5. The district court did not reach other contentions raised by appellee. The statute suffers from additional constitutional infirmities. Most significantly, the magazines here involved are clearly entitled to constitutional protection in the light of the decisions of the Court with respect to comparable material.

ARGUMENT.

I.

39 U.S.C. Section 4006, on Its Face and as Construed and Applied, Violates the Free Speech and Press, Due Process, Equal Protection, and Jury Provisions of the First, Fifth, Sixth and Seventh Amendments. The District Court Correctly Held That the Statute Conflicts With the Principles Enunciated by the Court in *Freedman v. Maryland*.

1. The statute, it is submitted, is clearly unconstitutional. Prior restraint here takes the form of administrative censorship, a system of restraint "peculiarly obnoxious to the guarantee of freedom of speech and press". Freund, *The Supreme Court of the United States* 66 (1961 ed.) The decision with respect to the suppression of the material is made by an official whose principal concern is a ban on the publications. The order of the Judicial Officer is the law, unless and until a person shoulders the burden of going to court to overturn it. Final restraint occurs before any judicial determination of the obscenity of the material has been made. No burden is placed upon the administrative agency to go to court, nor are any time limits imposed between the administrative agency's first consideration of the material and final judicial determination.

Moreover, prior restraint in the form of administrative censorship is particularly mischievous in the context of the circumstances herein. The publications found "obscene", as the record shows, were ordered and paid for by a willing adult. The letters containing orders and remittances for the publications come obviously from persons who are willing to receive them. It is an administrative official who stands "astride the

flow of mail", and who had decided by his own "evaluation of the material" that private choice by willing persons to receive the material shall be disregarded. It is not the householder who is the exclusive and final judge of what will cross his threshold; it is the Judicial Officer of the Post Office Department. In addition, the publisher and distributor of the publications are in effect denied circulation of the material through the mails, and the stigma of "Unlawful" is placed upon their publications.

The right of the public in a free society to unobstructed circulation of nonobscene publications is clearly abridged by 39 U.S.C. §4006. The standards and criteria enunciated in *Freedman v. Maryland*, 380 U.S. 51; *Stanley v. Georgia*, 394 U.S. 557; and *Rowan v. United States Post Office Department*, 90 S. Ct. 1484, are contravened by the statute herein involved.

2. The arguments of the government ignore modern history and current constitutional standards. The government concedes "that Congress' power of regulation over postal matters, as over commerce and tax, is limited by the stricture of the Bill of Rights". (Brief for Appellants, p. 17). It is urged, however, that just as Congress can authorize criminal prosecutions for using the mails to distribute obscene materials (citing *Roth* and 18 U.S.C. §1461), so too, Congress may authorize the administrative censorship here involved (citing *Kingsley Books, Inc. v. Brown*, *Ibid.*, p. 18). The government stresses the fraud statute (39 U.S.C. §4005), enacted in 1890, as the model for the statute here involved and points to *Public Clearing House v. Coyne*, 194 U.S. 497 (1904) and *Donaldson v. Read Magazine*,

333 U.S. 178 (1948) upholding the fraud statute. (*Ibid.*, pp. 5, 16-18).¹

It should be observed that we are concerned here with a governmental activity which directly affects the exercise of freedoms of speech and press. Whatever may be the power of Congress to restrict the dissemination of "obscene" material, the fact is that under the First Amendment Congress may not restrict the circulation of any publication which is not obscene. *Smith v. California*, 361 U.S. 147, 152. It is therefore necessary, under such circumstances, for a legislature to supply "sensitive tools" for the evaluation of First Amendment claims. The operation and effect of the method by which speech is sought to be restrained "must be subjected to close analysis and critical judgment". *Speiser v. Randall*, 357 U.S. 513, 520. Regula-

¹The constitutional validity of an unfettered power of censorship by the Post Office has constantly been questioned. "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." Justice Harlan in *Roth v. United States*, 354 U.S. at 505. See also, *Hannegan v. Esquire, Inc.*, 327 U.S. 146; Opinion of Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768; Concurring Opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 495-499; Paul and Schwartz, *Federal Censorship: Obscenity in the Mail*, Appendix I-3, pp. 252-263 (1961); Note, *Project: Post Office*, 41 So. Calif. L. Rev. 643-727 (1968). Indeed, in 1961, the then Postmaster ordered that all cases brought to enforce the obscenity laws be prosecuted through normal criminal procedures and all administrative and civil procedures be abandoned. The Postmaster stated: "It has been the policy of this Department under this Administration (since February 1961) to leave judging to the judges. It is the function of the administrator to direct to the attention of the criminal authorities those cases where the law may have been violated. When an administrator attempts to determine what constitutes obscenity, too often justice is entangled in a maze of administrative procedures, stopgap remedies, appeals, and delays. . . ." (Quoted in Konvitz, *Expanding Remedies*, 240-242 (1966).)

tions of obscenity must "scrupulously embody the most rigorous procedural safeguards . . . a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks". *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66. See, Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518-551 (1970).

Cases like *Public Clearing House v. Coyne* and *Donaldson v. Read Magazine*, upon which the government so heavily relies, do not reflect current judicial attitudes. Both cases are premised on the notion that Congress, in establishing a postal service, may annex such conditions to it as it chooses. This notion has been described as "hoary dogma" which has "long since evaporated". See, Justice Harlan in *Roth v. United States*, 354 U.S. 476, 504, fn. 5; the dissenting opinions of Justices Holmes and Brandeis in *Leach v. Carlile*, 258 U.S. 138, 140-141; *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 427-428, 436-438; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156; Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1599-1602 (1960); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). The use of the mails today is not a privilege to which the Congress or the Post Office can attach any condition it chooses. The use of the mails is essential for many types of communications. When a postal statute affects expression, the exercise of the postal power must be tested against the demands of the First Amendment. ". . . the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits." *Hiett v. United States*, 415 F. 2d 664, 668 (5 Cir. 1969), cert. den. 397 U.S. 936.

The *Public Clearing House* and *Donaldson* decisions, involving schemes to defraud and the use of the mails for the purpose of executing such fraudulent schemes, were also based upon the view that in such cases the lack of any provision for a judicial hearing on the question of illegality was not repugnant to the due process clause of the Constitution. In relying upon these older decisions, the government again ignores the developing constitutional standards affecting the censorship of "obscenity". The procedural safeguards which have been designed by the Court to obviate the dangers of a censorship system have been based primarily on the guarantees of the First Amendment. "Thus, rather than attempting to apply the traditional requirements of due process to obscenity determinations, the Court has judged the adequacy of procedures by a different standard: does the procedure show 'the necessary sensitivity to freedom of expression?' " Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. at 518-519.

In *Freedman v. Maryland*, 380 U.S. 51, 58, the Court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." Elimination of arbitrary and discriminatory use of restraint powers in the area of "obscenity" requires judicial superintendence prior to final restraint on speech and press. Only in this way can the regulation of obscenity avoid infringing on nonobscene materials. The protected nature of speech and press, under the Constitution, cannot be left to the final determination of an administrative agency.

The principles enunciated in *Bantam and Freedman* have been repeatedly affirmed by the Court and appellate and district courts in the federal jurisdiction. *Marcus v. Search Warrants of Property*, 367 U.S. 717; *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181-182; *Dombrowski v. Pfister*, 380 U.S. 479, 494; *United States v. Robel*, 389 U.S. 258, 277-278. See also, *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969) cert. den. 90 S. Ct. 477; *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969) cert. den. 90 S. Ct. 929; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, F. 2d, (2 Cir.) Docket No. 33997, cert. den 90 S. Ct. 941; *Demich, Inc., et al. v. Ferdon, et al.*, 426 F. 2d 643 (9 Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Percy*, 393 F. 2d 202 (7 Cir. 1968); *Potwora v. Dillon*, 386 F. 2d 74 (2 Cir. 1967); *United States v. Alexander*, F. 2d (8 Cir. May 22, 1970). The general proposition that a prior adversary judicial determination must be made before alleged obscene material may be suppressed has also been followed by a host of federal district courts. See, *Carroll v. City of Orlando*, 311 F. Supp. 967, 968 (D.C. Fla. 1970), for a listing of the numerous cases.²

²The pragmatic reasons for requiring judicial determination in an adversary proceeding prior to restraint upon expression are multifold. Courts are more able consistently to understand and to apply the values embodied in the constitutional guarantees of freedom of speech and press on delicate questions of First Amendment freedoms than administrative officials. A court decision is likely to gain more public respect than a decision by an adminis-

(This footnote is continued on the next page)

It is therefore plain, it is submitted, in the light of constitutional requirements, that a statute which makes no provision for judicial superintendence in a procedure which censors and suppresses expression is constitutionally invalid. If such a statute, moreover, fails to provide for prompt judicial review of the administrative determination; if the burden is not placed by the statute upon the administrative official to go to court to prove that the material involved is unprotected expression, the burden resting on the administrative official to make such proof; if the restraint imposed in advance of final judicial determination is not limited to the shortest fixed period compatible with sound judicial resolution; and if the statutory procedure does not assure a prompt, final judicial decision, the statute must be deemed clearly violative of the guarantees of the First Amendment. *Freedman v. Maryland*, 380 U.S. 51, 57-60. See also, *Teitel Film Corp. v. Cusak*, 390 U.S. 139.

A statute dealing with the exercise of freedoms of expression which is completely devoid of the procedural safeguards necessary to protect such freedoms stands as a "pervasive threat inherent in its very existence" and sweeps within its ambit activities "that in ordinary circumstances constitute an exercise of freedom of speech

trator who has been appointed because of his political affiliations. The long judicial tenure of judges may free them from direct political pressures which an administrator may not be able to resist. See, Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. at 522-524; 4 K. Davis, *Administrative Law*, §§30.06-30.09 (1958). Especially where questions of "constitutional judgment of the most sensitive and delicate kind" (*Roth v. United States*, 354 U.S. at 498) are involved, abnegation of judicial supervision would be inconsistent with the duty of the judiciary "to uphold the constitutional guarantees". (*Jacobellis v. Ohio*, 378 U.S. at 188).

or of the press . . . results in a continuous and pervasive restraint on all freedom of discussion that might be reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98. See, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969).

Measured by all the foregoing, 39 U.S.C. §4006 is unconstitutional on its face. The statute permits censorship by an administrative official, without any judicial determination prior to or following final restraint. No procedural safeguards of any kind for the protection of nonobscene material are contained in the statute. Reliance by the government on *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (Brief for Appellants, pp. 14, 18, 26 and 32) is misplaced, as the critical analysis of the Court in *Marcus v. Search Warrants*, 367 U.S. 717, 734-738, makes plain.

3. The attempts by the government to distinguish *Freedman v. Maryland*, *Lamont v. Postmaster General* and *Stanley v. Georgia* are unsupported. "Constitutional rights should not be frittered away by arguments so technical and unsubstantial". Justice Brandeis in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 431.

The government contends that, unlike *Freedman*, there is no issue here "of prior censorship or restraint of publication". (Brief for Appellants, p. 22). The fact is, however, that the statute permits, initially, upon "evidence satisfactory to the Postmaster General", a determination that material being sent through the mail is "obscene" and that remittances are being obtained by the publisher or distributor for such alleged obscene

material. The regulations provide, and the case herein demonstrates, that the aforesaid determination is initially manifested by the filing of a complaint by the General Counsel of the Post Office Department and the issuance of a notice of hearing to the publisher or distributor concerned. 39 C.F.R. §§952.5, 952.7-952.8. A complaint which notifies a publisher or distributor that there is "probable cause to believe" that he is conducting an enterprise in violation of the federal statute; that he is obtaining remittances of money for "obscene" magazines and giving information where such matter can be obtained, and requesting the issuance of an order under the statute which will require all letters sent to the publisher or distributor to be returned and marked "Unlawful", can hardly fail to induce a self-censorship and restrictions upon the public's access to speech and press which the Post Office "could not constitutionally suppress directly". *Smith v. California*, 361 U.S. 147, 154.⁸

Following this initial inhibition upon the distribution of the material, the time for answer is fixed at

⁸It is argued by the government that to forbid an initial determination of obscenity from being made by an administrative official would "raise grave doubts about the administrative process in many areas". (Brief for Appellants, p. 23). We do not deal here with the highly technical and complex subject matter in which such agencies as the National Labor Relations Board and Federal Communications Commission are generally involved. Such administrative agencies may have specialized expertise for dealing with the subject matter within their control. Whatever may be the expertise of the Postmaster General in the administration of the Post Office Department, it does not include a special competence to determine what constitutes obscenity under the standards and criteria enunciated by the Court and the application of such standards and criteria to the alleged "obscene" material. The determination of such questions is peculiarly for the courts, particularly in the light of the constitutional questions involved in every determination of "obscenity".

15 days and the hearing date is fixed at 30 days of the date of the notice of hearing, "whenever practicable". C.F.R. §952.7. The presiding officer at any hearing is either a Hearing Examiner or a Judicial Officer and the Rules of Evidence "covering civil proceeding in matters not involving trial by jury in the courts of the United States shall govern". C.F.R. §§952.17, 952.18. Not later than 5 days after the filing of the answer to the complaint, any party may file application for the taking of testimony by deposition. C.F.R. §952.21. Hearings are stenographically reported by a contract reporter of the Post Office Department. Within 10 days after the receipt by any party of the official transcript, he may file a motion requesting correction of the transcript. C.F.R. §952.22. Proposed findings of fact and conclusions of law must be filed within 15 days after the delivery of the official transcript. C.F.R. §952.23. A written "initial decision" shall be rendered "with all due speed". C.F.R. §952.24. Within 15 days from the receipt of the tentative decision, a party may file exceptions. C.F.R. §952.25. Briefs in support of exceptions to a tentative decision may be filed 10 days after receipt. C.F.R. §952.25. Within 10 days from the date of a final decision, either party may file a motion for reconsideration. C.F.R. §952.27. It is plain that the regulations do not provide for speedy determinations. In the case herein, the proceedings were initiated on November 1, 1968, and the departmental decision rendered on December 31, 1968, a period of two months.

Neither the statute nor the regulations make any provision for judicial superintendence, either during the proceedings or subsequent to the rendition of the final

order by the administrative official. There is simply no burden placed upon the administrative agency to institute judicial proceedings; the order blocking the mail is immediately effective without any assurance of judicial review, let alone "prompt judicial determination". Indeed, we are told by the government: "It is true that, in the absence of an attempt to obtain judicial review, a Section 4006 order may take effect immediately, so that the burden of seeking review is on the person subject to the order". (Brief for Appellants, p. 24).

All that the government can suggest is that the publisher or distributor is "free to sell by other means", or if the publisher or distributor will assume the burden of going to court, then, suggests the government, "the necessary implication" is that the sales of the material are "merely postponed". In short, the government concedes that the statute makes no provision for initiation of judicial proceedings by the administrative agency, and the government continues to insist that the publisher or distributor must assume that burden. The suggestion that if such burden is assumed, the material will then only be "impounded" and not returned is a dubious act of grace which Congress did not provide, is not contained in the regulations, and which in no way avoids the constitutional infirmity of the statute under *Freedman*.⁴

The government states that if the publisher or distributor will assume the burden of going forward in a judicial proceeding and subject himself to the "im-

⁴"Impounding one's mail is plainly a 'sanction', for it may as effectively close down an establishment as the sheriff himself." Justice Douglas in *Stanard v. Olesen*, 74 S. Ct. 768, 771.

plied" impounding, then if the remitters become discouraged after a time of no response, "a publisher could explain the reason for delay to them if he ultimately prevailed, and thus retain their business". (Brief for Appellants, p. 25). After this statement, the government ventures the conclusion that "the publisher's burden on initiating judicial review is not so serious as to condemn the statute under the First Amendment". (*Ibid.*, pp. 25-26). Appellee submits that the government has in no meaningful way distinguished *Freedman*. The substance of the government's arguments is unfettered administrative censorship without judicial superintendence. Such contention, if sustained, would abridge seriously freedom of expression.⁵

With respect to *Stanley v. Georgia*, the government states that if the decision be read as holding that consensual adult access to obscene materials is protected from governmental interference, "then it might appear that use of the mails—inherently private and, in the case of a mailed order blank, ordinarily consensual—is indeed protected from government regulation". (Brief for Appellants, p. 19). The government also concedes that if *Stanley* be so read, that "consensual, non-commercial correspondence sent through the mail would

⁵The government would not only place the burden upon the publisher or distributor to go to court, but would require such persons to carry the "burden of persuasion on judicial review". (Brief for Appellants, p. 26). In short, the publisher or distributor would have to bear the burden of persuasion to show that he did not engage in criminal speech. *Cf.*, *Freedman v. Maryland*, 380 U.S. at 58. Nothing in footnote 22 of *Interstate Circuit v. Dallas* (Brief for Appellants, p. 26) supports the government's position. The Dallas ordinance specifically provided "that the Board has the burden of going to court to seek a temporary injunction, once the exhibitor has indicated his nonacceptance, and there it has the burden of sustaining its classification". 390 U.S. 676, 690.

be found to enjoy immunity under *Stanley* from seizure or use as the basis for prosecution" (Brief for Appellants, p. 20), citing *Redmond v. United States*, 384 U.S. 264.

The government urges the arguments it has advanced in *Byrne v. Karalexis*, insisting that *Stanley* did not confer upon a willing person any right to receive obscene materials. It should be noted in this connection that the government brief leaves unmentioned *Rowan v. United States Post Office Department*, 90 S. Ct. 1484. The issues have been touched upon by counsel for appellee here in *Batchelor v. Stein*, October Term 1969, No. 565, Brief of Mel S. Friedman, Esq. and Stanley Fleishman, Esq. as Amici Curiae in Support of Appellee; *Byrne v. Karalexis*, October Term 1969, No. 1149, Motion for Leave to File Brief Amici Curiae, and Brief, on Behalf of National General Corp., et al. (See Addendum to Brief); *Grove Press v. Maryland State Board of Censors*, October Term 1970, No. 63, Motion for Leave to File Brief and Brief as Amicus Curiae for Adult Film Association of America, Inc.; *United States v. Thirty-Seven (37) Photographs*, October Term 1969, No 1475, Motion to Affirm; *United States v. Reidel*, October Term 1970, No., Motion to Affirm.

Stanley held that the assertion of a governmental interest in dealing with the problem of obscenity cannot, in every context, be insulated from all constitutional protections. "Neither *Roth* nor any other decision of this court reaches that far." 394 U.S. at 564. The suggestion in *Roth* that obscenity is outside the area of First Amendment protection because utterly without social importance is rejected in *Stanley*. The

"right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society". 394 U.S. at 564. It is clear, stated the Court in *Stanley*, that freedom of speech and press necessarily protects the right to receive information and ideas. This right to receive information and ideas, regardless of their social worth, "is fundamental to our free society". 394 U.S. at 564. In *Stanley*, the Court could find no countervailing state interest justifying restriction of the aforesaid fundamental rights. The only evils which the State might have a right to prevent, the distribution of obscene material to minors or the distribution in such a manner as to invade the privacy or sensibilities of the general public, were not present in the context of private consumption of ideas and information. 394 U.S. at 565-567. In *Stanley*, the Court based its ruling upon prior decisions rendered by the Court in *Martin v. City of Struthers*, 319 U.S. 141; *Griswold v. Connecticut*, 381 U.S. 479; and *Lamont v. Postmaster General*, 381 U.S. 30. Those decisions make it clear that freedom of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it . . . Freedom to distribute information to every citizen wherever he desires to receive it is . . . clearly vital to the preservation of a free society". 319 U.S. at 143-147. Under *Stanley* and *Rowan*, it is the adult citizen who is made the exclusive and final judge of what ideas, information or entertainment he will receive.

Contrary to the government's position, the legal commentators have virtually been uniform in their conclusion that the elimination of adult censorship by *Stanley* has sound doctrinal support; is constitutional-

ly required; and is socially desirable. The consensus is that *Stanley* has correctly focused the interest of the State upon minors and unwilling adults. Laughlin, *A Requiem for Requiems: The Supreme Court at the Bar of Reality*, 68 Mich. L. Rev. 1389-1408 (1970); Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185-236 (1969); Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421-468; Note, *First Amendment: The New Metaphysics of the Law of Obscenity*, 57 Calif. L. Rev. 1257-1280 (1969); Ratner, *The Social Importance of Prurient Interest—Obscenity Regulation v. Thought-Privacy*, 42 So. Calif. L. Rev. 587-599 (1969); Karre, *Stanley v. Georgia: New Directions in Obscenity Regulation?*, 48 Tex. L. Rev. 646-660 (1970). See also, *United States v. Lethe*, 312 F. Supp. 421 (D.C. Calif. 1970).

With respect to the government's assertion that the mails here are being used for a commercial purpose and that "concern for the privacy of ideas is no longer appropriate" (Brief for Appellants, p. 20), it appears plain that the statement is erroneous on its face. We do deal here with protection of expression, with ideas, information and entertainment ordinarily protected by the First Amendment. That the appellee received remittances for its publications does not render the publications "commercial" in the First Amendment sense. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266. Regulation of the use of the mails under the circumstances here presented is, therefore, as much forbidden under *Stanley* as would be other consensual correspondence sent through the mails. There is no difference in "degree of concern for the privacy of ideas" in either case (Brief for Appellants, pp. 19-20).

The claim by the government that the statute here does not offend the principles enunciated in *Lamont v. Postmaster General*, 381 U.S. 103, also appears tenuous. It is claimed that *Lamont* involved "mailing activities which were lawful", while the "trafficking in obscenity is not". (Brief for Appellants, p. 21). But in *Lamont*, the federal officials had condemned the literature as "communist political propaganda" (381 U.S. at 307) and the statute itself had defined communist political propaganda in the terms of the Foreign Agents Registration Act of 1938 (381 U.S. at 302-303). The government states that in *Lamont*, the addressee who requested delivery of the material had to bear "the stigma" of stating that he wished to receive documents classified as "communist political propaganda". On the other hand, the government argues that no comparable stigma is imposed by the requirement under §4006 that an addressee inspect his mail in the presence of Post Office officials for determination as to what is or is not "Unlawful".

The distinctions attempted to be drawn by the government are plainly without merit. The interception of mail addressed to a publisher or distributor containing orders for publications and remittances is conduct which "touches basic freedoms". *Stanard v. Olesen*, 74 S. Ct. at 771. Freedom of the press includes liberty of circulation and these freedoms are severely undermined if a publisher or distributor cannot receive orders or payment for his publications and, indeed, is further stigmatized by having all mail addressed to him sent back to his customers with the word "Unlawful" stamped on the outside of the envelope. Under such circumstances, to compel a publisher or distributor to

repair to a designated Post Office and examine his mail in the presence of postal employees, and to receive only that which is "not connected with the unlawful activity", is an unconstitutional abridgment of the publisher's or distributor's First Amendment rights. Moreover, it is submitted that the statute here involved, which permits the type of detention order made in this case, also deprives the senders of the letters of their constitutional rights and that appellee has the standing to vindicate the senders' rights. *NAACP v. Alabama*, 357 U.S. 449, 458-460.

4. The invalidity of the government's arguments is finally exemplified by the suggestion that since "the court might conclude that questions remain regarding the fact and timing of judicial involvement in its [the statute's] enforcement", then a "further limiting construction might be adopted which would meet these doubts and thus avoid invalidating the entire scheme". (Brief for Appellants, p. 26). In short, the government requests judicial rewriting. *Cf.*, *Aptheker v. Secretary of State*, 378 U.S. 500; *United States v. Robel*, 389 U.S. 258. The difficulty with the government's position in this respect is, first, the general considerations which militate against the assumption of legislative functions by the judiciary and, second, the fact that the suggested judicial amendment to the statute will not cure the constitutional defects.

The suggestion of the government is that an appeal from a Section 4006 administrative order be treated "as staying it in its entirety until resolution of the appeal". (Brief for Appellants, pp. 26-27). The government argues that it would be appropriate to treat an appeal of a Section 4006 order "as automatically

staying its effect, where there was no Section 4007 judicial order for temporary detention of mail." (Brief for Appellants, p. 28). It is conceded by the government that the burden would still be on the publisher or distributor to go to court but, argues the government, "the initiative of filing an appeal from the administrative order is so slight that it could not invalidate the statutory scheme on First Amendment grounds". (Brief for Appellants, p. 28).

The Court has on a number of occasions indicated its opposition to judicial rewriting of overbroad statutes which impinge on First Amendment rights. The Court has been unwilling to usurp the legislative function, especially when, as in the case herein, the legislature has made it clear that it is opposed to the suggested judicial construction. Moreover, the Court has indicated that statutes which are presumptively unconstitutional, as in the case herein, and which are overbroad may still have a "chilling effect" even when judicially rewritten, since individuals will be generally aware only of the existence of the statute rather than any limiting construction. Finally, judicial rewriting is plainly inappropriate where the legislature has within its power "less drastic" means of achieving its objectives. Administrative censorship is the most obnoxious means of deciding the alleged unlawfulness of particular speech or press. "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminatory cast and overly broad scope without substantial rewriting". *Aptheker v. Secretary of State*, 378 U.S. at 515. "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment

rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress." *United States v. Robel*, 389 U.S. at 267. See also, Note, *Judicial Rewriting of Overbroad Statutes*, 57 Calif. L. Rev. 240-261 (1969).

In addition, the suggested construction by the government does not meet the constitutional standards and criteria enunciated in *Freedman*. Not only is the publisher or distributor still required to go to court and bear the burden of persuasion under the suggested construction, but there is still no provision for a brief time limit between the initiation of the administrative proceedings and the final judicial determination, and there is still no provision in the statute for any prompt, final judicial determination. When all of these factors are considered, together with the pending report to Congress of the President's Commission on Obscenity and Pornography, it is submitted that the attempt by the government to save the statute by its proposed judicial rewriting is unfounded. The only result would be to render the statute vague, uncertain and ambiguous, as well as overbroad.

5. In light of all the foregoing discussion, it is submitted that the district court correctly held that 39 U.S.C. §4006 is unconstitutional on its face. The district court did not reach other contentions raised by appellee. The statute permits the suppression of expression without the protections of a jury trial, without any requirements of proof of *scienter* or the essential elements of obscenity, and without any of the safeguards afforded in judicial proceedings involving publications ordinarily entitled to the protective guarantees of the First Amendment. See, Opinion of Justice Brennan in *Kingsley*

Books, Inc. v. Brown, 354 U.S. at 447-448; *Smith v. California*, 361 U.S. 147; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Speiser v. Randall*, 357 U.S. 513; *Memoirs v. Massachusetts*, 383 U.S. 413. Perhaps most significantly, the magazines here involved are clearly entitled to constitutional protection. *Bloss v. Dykema*, 90 S. Ct. 1727; *Carlos v. New York*, 90 S.Ct. 395; *Walker v. Ohio*, 90 S. Ct. 1884; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Conner v. City of Hammond*, 389 U.S. 48; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Rosenbloom v. Virginia*, 388 U.S. 450; *Redrup v. New York*, 386 U.S. 767.*

Conclusion.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Of Counsel.

*The holding by the district court in *United States v. The Book Bin*, the companion case herein involving the validity of 39 U.S.C. §4007, cogently demonstrates, it is submitted, the constitutional invalidity of both §§4006 and 4007. (A. 96-105).

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BLOUNT, POSTMASTER GENERAL, ET AL. V. RIZZI, DBA THE MAIL BOX

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 55. Argued November 10, 1970—Decided January 14, 1971*

Title 39 U. S. C. § 4006 permits the Postmaster General to stamp as "Unlawful" and return to the sender letters addressed to any person and to prohibit the payment of postal money orders to that person if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene . . . matter" or is using the mails to distribute information about how such items may be obtained. Under departmental regulations, following complaint and notice of hearing, a Judicial Officer holds a hearing and renders his opinion "with all due speed" from which there is an administrative appeal. Section 4007 permits district courts to order the defendant's incoming mail detained pending completion of the § 4006 proceedings, upon a showing of "probable cause" to believe that § 4006 is being violated, under the standards fixed by Fed. Rule Civ. Proc. 65. In No. 55, appellee, a retail magazine distributor against whom the Postmaster General had instituted a § 4006 proceeding, brought an action in the District Court seeking declaratory and injunctive relief. A three-judge court held the statute unconstitutional for failure to meet the requirements of *Freedman v. Maryland*, 380 U. S. 51, which held with respect to a scheme of administrative censorship that (1) the censor must initiate judicial review and prove that the material is unprotected expression; (2) "prompt judicial review" is mandatory; and (3) any restraint before a final judicial determination must be limited to the shortest, fixed period compatible with sound judicial resolution. In No. 58,

*Together with No. 58, *United States et al. v. The Book Bin*, on appeal from the United States District Court for the Northern District of Georgia.

Syllabus

where the Postmaster General applied for a § 4007 order, the District Court, on appellee distributor's counterclaim, held § 4006 unconstitutional under *Freedman v. Maryland*, *supra*, and that § 4007's "probable cause" standard was constitutionally insufficient to support a temporary mail detention order. *Held*: The administrative censorship scheme created by 39 U. S. C. §§ 4006, 4007 violates the First Amendment since it lacks adequate safeguards against undue inhibition of protected expression. *Freedman v. Maryland*, *supra*. Pp. 5-11.

(a) The statutory scheme does not require governmentally initiated judicial participation in the procedure barring the magazines from the mails or assuring prompt judicial review. P. 7.

(b) The authority given the Postmaster General under § 4007 to apply for a court order for temporary mail detention does not cure the defects in § 4006 since the procedure is only discretionary and the requirement for prompt judicial review is not satisfied by a "probable cause" finding. Pp. 9-10.

(c) Section 4007 fails to provide that any restraint preceding a final judicial determination "be limited to preservation of the status quo for the shortest period compatible with sound judicial resolution." 380 U. S., at 59. Pp. 10-11.

No. 55, 305 F. Supp. 634; No. 58, 306 F. Supp. 1023, affirmed.

BRENNAN, J., delivered the opinion of the Court in which all Justices joined except BLACK, J., who concurred in the result.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 55 AND 58.—OCTOBER TERM, 1970

Winton M. Blount, Postmaster General of the United States, et al., Appellants, 55 v. Tony Rizzi dba The Mail Box.	} On Appeal From the United States Dis- trict Court for the Central District of California.
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United States et al., Appellants, 58 v. The Book Bin.	} On Appeal From the United States Dis- trict Court for the Northern District of Georgia.
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[January 14, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Mail Box, No. 55, draws into question the constitutionality of 39 U. S. C. § 4006 (1964) (now 39 U. S. C. § 3006, Postal Reorganization Act, 84 Stat. 719, 747-748), under which the Postmaster General, following administrative hearings, may halt use of the mails and of postal money orders for commerce in allegedly obscene materials. *Book Bin*, No. 58, also draws into question the constitutionality of § 4006, and, in addition, the constitutionality of 39 U. S. C. § 4007 (1964) (now 39 U. S. C. § 3007), under which the Postmaster General may obtain a court order permitting him to detain the defendant's incoming mail pending the outcome of § 4006 proceedings against him. 39 U. S. C. § 4006 provides in pertinent part:

"Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene . . . matter . . . , or is depositing or causing to be deposited in the United

States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

“(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or his representative, to return the registered letters or other letters or mail to the sender marked ‘Unlawful’; and

“(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.”

Proceedings under § 4006 are conducted according to departmental regulations. A proceeding is begun by the General Counsel of the Post Office Department by written complaint and notice of hearing. 39 CFR §§ 952.5, 952.7, 952.8. The Judicial Officer of the Department holds a trial-type hearing at which a full record is transcribed. He renders an opinion which includes findings of fact and a statement of reasons. 39 CFR §§ 952.9–952.25. The decision is to “be rendered with all due speed,” 39 CFR § 952.24 (a), and there is an administrative appeal. 39 CFR § 952.25. No § 4006 order may issue against the defendant until completion of the administrative proceeding. If, however, the Postmaster General wishes to detain the defendant’s incoming mail before the termination of the § 4006 proceedings, he may apply to the United States District Court for the district in which the defendant resides under 39 U. S. C. § 4007, which in pertinent part provides: ¹

¹ Section 4006 was enacted in 1950. 64 Stat. 451. In 1956 the Postmaster General sought and obtained the power himself to enter an order, pending administrative proceedings under § 4006, that all mail addressed to the defendant in the § 4006 proceeding be impounded. The order was to expire at the end of 20 days unless the

"In preparation for or during the pendency of proceedings under [§ 4006] of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a

Postmaster General sought in a Federal District Court, an order continuing the impounding. 70 Stat. 699. In 1959, extensive hearings were held in the House on the Post Office's request that the 20-day period be extended to 45 days, and that the standard of necessity be changed to "public interest." Hearings on Obscene Matter Sent Through the Mail before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., Pts. 1, 2, and 3 (1959); Hearings on Detention of Mail for Temporary Periods before the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. (1959). Instead, Congress enacted § 4007 which stripped the Postmaster General of his power to issue an interim order for any period, and directed him to seek such an order in a federal district court. One Senate Report expressed misgivings when the Postmaster General had originally sought the impounding power: "The committee recognizes that even in its present form the bill gives the Postmaster General extraordinary and summary powers to impose a substantial penalty by impounding a person's mail for up to 20 days in advance of any hearing or any review by the courts. Such power is directly contrary to the letter and spirit of normal due process, as exemplified by the Administrative Procedure Act, which requires a hearing before any penalty may be imposed. The Post Office Department has made its case for this legislation on the grounds that a temporary and summary procedure is required to deal with fly-by-night operators using the mails to defraud or to peddle pornography, who may go out of business—or change the name of their business or their business address—before normal legal procedures can be brought into operation. The Post Office Department has not recommended, nor does this committee approve, the use of the temporary impounding procedure under this bill as a substitute for the normal practice of an advance hearing or the bringing of an indictment for violation of the criminal code in all cases involving legitimate and well-established business operations. The committee would not approve the use of the extraordinary summary procedure under the bill against legitimate publishers of newspapers, magazines, or books in cases in which a Postmaster General might take objection to an article, an issue, or a volume." S. Rep. No. 2234, 84th Cong., 2d Sess., 2-3 (1956).

showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings."²

In *Mail Box*, the Postmaster General began administrative proceedings under § 4006 November 1, 1968. The administrative hearing was concluded December 5, 1968. The Judicial Officer filed his decision December 31, 1968, finding that the specified magazines were obscene and, therefore, entered a § 4006 order—61 days after the complaint was filed. Mail Box filed a complaint in the United States District Court for the Central District of California seeking a declaratory judgment that § 4006 was

² Section 4007 also authorizes the Postmaster General to apply for an impounding order during the pendency of proceedings under 39 U. S. C. § 4005, now § 3005. Section 4005, as amended (82 Stat. 1153), permits the return to the sender of any mail sent to the perpetrator of what the Postmaster General finds to be a scheme for obtaining money by means of false representations. That section has been upheld against First Amendment attack. *Donaldson v. Read Magazine*, 333 U. S. 178 (1947). The Government does not argue in its brief that *Donaldson* compels the conclusion that § 4006 also is constitutional but only that "Section 4006, like the fraud statute upheld in *Donaldson* . . . meets all necessary constitutional standards." Brief for Appellants, at 20. On oral argument, the Government suggested that an affirmance in this case might jeopardize the validity of § 4005 and the continued vitality of *Donaldson*. But no argument was offered to support the suggestion.

unconstitutional and an injunction against enforcement of the administrative order. A three-judge court was convened and held that 39 U. S. C. § 4006 "is unconstitutional on its face, because it fails to meet the requirements of *Freedman v. Maryland* (1965) 380 U. S. 51" 305 F. Supp. 634, 635 (1969). The court, therefore, vacated the administrative order, directed the delivery "forthwith" of all mail addressed to Mail Box, and enjoined any proceedings to enforce § 4006.

In *Book Bin*, the Postmaster General applied to the District Court for the Northern District of Georgia for a § 4007 order pending the completion of § 4006 proceedings against *Book Bin*.³ *Book Bin* counterclaimed, asserting that both §§ 4006 and 4007 were unconstitutional and that their enforcement should be enjoined. A three-judge court was convened and held both sections unconstitutional. It agreed with the three-judge court in *Mail Box* that the procedures of § 4006 were fatally deficient under *Freedman v. Maryland*, *supra*, and also held that the finding under § 4007 merely of "probable cause" to believe material was obscene was not a constitutionally sufficient standard to support a temporary mail detention order. 306 F. Supp. 1023 (1969).

We noted probable jurisdiction of the Government's appeals. 397 U. S. 959, 960 (1970). We affirm the judgment in each case.

Our discussion appropriately begins with Mr. Justice Holmes' frequently quoted admonition that, "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues" *Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U. S. 407, 437 (1921) (dissenting opin-

³ The order was sought with respect to a single issue of one magazine.

ion); see also *Lamont v. Postmaster General*, 381 U. S. 301 (1965). Since § 4006 on its face, and § 4007 as applied, are procedures designed to deny use of the mails to commercial distributors of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U. S. 717, 731 (1961). Rather, the First Amendment requires that procedures be incorporated which "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . . . Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . ." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66 (1963). Since we have recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools" *Speiser v. Randall*, 357 U. S. 513, 525 (1958).

The procedure established by § 4006 and the implementing regulations omit those "sensitive tools" essential to satisfy the requirements of the First Amendment. The three-judge courts correctly held in these cases that our decision in *Freedman v. Maryland*, 380 U. S. 51 (1965) compels this conclusion. We there considered the constitutionality of a motion picture censorship procedure administered by a State Board of Censors. We held that to avoid constitutional infirmity a scheme of adminis-

trative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. 380 U. S., at 58-60.

These safeguards are lacking in the administrative censorship scheme created by §§ 4006, 4007, and the regulations.⁴

The scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure which bars the magazines from the mails, or even any provision assuring prompt judicial review. The scheme does differ from the Maryland scheme involved in *Freedman* in that under the Maryland scheme the motion picture could not be exhibited pending conclusion of the administrative hearing, whereas under § 4006 the order to return mail or to refuse to pay money orders is not imposed until there has been an administrative determination that the magazines are obscene. This, however, does not redress the fatal flaw of the procedure in failing to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material; rather, once the administrative proceedings disapprove the magazines the distributor "must assume the burden of instituting judicial proceedings and of persuading the courts that the . . . [magazines are] . . . protected expression." 380 U. S., at 59-60. The First

⁴ We therefore have no occasion to consider the argument of appellees that *Stanley v. Georgia*, 394 U. S. 557 (1969) presupposes that an individual has a constitutional right to obtain possession of the challenged materials by delivery through the mail.

Amendment demands that the Government must assume this burden. "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U. S., at 58.⁵

Moreover, once a § 4006 administrative order has been entered against the distributor, there being no provision for judicial review, the Postmaster may stamp as "unlawful" and immediately return to the sender orders for purchase of the magazines addressed to the distributor, and prohibit the payment of postal money orders to him. Such a scheme "presents peculiar dangers to constitutionally protected speech. . . . Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." 380 U. S., at 57-58.⁶ The Govern-

⁵ In 1962, three Justices of the Court stated: "[We have] . . . no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts." *Manual Enterprises v. Day*, 370 U. S. 478, 518-519 (1962) (opinion of BRENNAN, J.).

⁶ The judicial officer is appointed by the Postmaster General to "perform such quasi-judicial duties as the Postmaster General may designate." 39 U. S. C. § 308a (1964). He functions as hearing examiner in many proceedings in addition to those under § 4006. The Government argues that the judicial officer enjoys "many of the insulations that judges enjoy." What the Constitution requires, however, is that a noncriminal censoring process require governmentally initiated full judicial participation. Clearly, § 4006 does not so provide.

ment suggests that we avoid the constitutional question raised by the failure of § 4006 to provide that the Government seek a prompt judicial determination by construing that section to deny the administrative order any effect whatever, if judicial review is sought by the distributor, until the completion of that review. Apart from the fact that this suggestion neither requires that the Government initiate judicial proceedings, nor provides for a prompt judicial determination, it is for Congress, not this Court, to rewrite the statute.

The authority of the Postmaster General under § 4007 to apply to a district court for an order directing the detention of the distributor's incoming mail pending the conclusion of the § 4006 administrative proceedings and any appeal therefrom plainly does not remedy the defects in § 4006. That section does not provide a prompt proceeding for a judicial adjudication of the challenged obscenity of the magazine.⁷ First, it is entirely discretionary with the Attorney General whether to institute a § 4007 action and, therefore, the section does not satisfy the requirement that the Government assume the burden of seeking a judicial determination of the alleged obscenity of the magazines. Second, the district court is required to grant the relief sought by the Postmaster upon a showing merely of "probable cause" to believe § 4006 is being violated. We agree with the three-judge court in *Book Bin* that to satisfy the demand of the First Amendment "it is vital that prompt judicial review on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §§ 4006, 4007 are invoked." 306 F. Supp., at 1028. Indeed, the statute expressly pro-

⁷ The Court said in *Freedman v. Maryland* that the procedure considered in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957), provides "a model . . . [of an] . . . injunctive procedure designed to prevent the sale of obscene books." 380 U. S., at 60.

vides that, "An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings."⁸

Moreover, § 4007 does not in any event itself meet the requisites of the First Amendment. Any order issued by the district court remains in effect "pending the conclusion of the statutory proceedings and any appeal therefrom."⁹ Thus, the statute not only fails to pro-

⁸ This provision was added at the request of Postmaster General Summerfield who desired it expressly to forestall judicial review pending completion of the administrative proceeding. "This would guarantee that counsel for a mailer will not be able to raise successfully a bar to all further administrative proceedings in a case in which the Government failed to prevail on its motion for a preliminary injunction." Letter from Arthur E. Summerfield, Postmaster General, to Senator Olin D. Johnston, Chairman, Senate Committee on Post Office and Civil Service, U. S. Code Cong. and Ad. News, 86th Cong., 2d Sess. 3249 (1960). In 1959, Postmaster General Summerfield had testified:

"In spite of the frustrations and legal complications and even the court decisions [which the Postmaster General had described as handing down 'very broad definitions of obscenity'] I feel a responsibility to the public to attempt to prevent the use of the mails for indecent material, and to seek indictments and prosecutions for such offenses, even though it may be argued that it falls in the category of material concerning which there have been previous rulings favorable to promoters." Hearings on Obscene Matter Sent Through the Mail before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. 6-7 (1959).

⁹ The Government points out that orders under §§ 4006 and 4007 generally allow the addressee to open its mail at the post office and receive any first class mail demonstrated clearly not to be connected with the allegedly unlawful use. This provision is provided in light of 39 U. S. C. § 4057 which provides that "Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department." See also 39 CFR § 117. But, query whether such provision of the order requires an "official act," *vis.* examining the mail, which constitutes an unconstitutional limitation on the addressee's First Amendment rights. *Lamont v. Postmaster General*, 381 U. S. 301 (1965).

vide that the district court should make a final judicial determination of the question of obscenity, expressly giving that authority to the judicial officer, but it fails to provide that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." 380 U. S., at 59.

The appellees here not only were not afforded "prompt judicial review" but they "can only get full judicial review on the question of obscenity—by which the Postmaster would be actually bound—after lengthy administrative proceedings, and then only by [their] own initiative. During the interim, the prolonged threat of an adverse administrat[ive] decision in § 4006 or the reality of a sweeping § 4007 order, will have a severe restriction on the exercise of [appellees'] First Amendment rights—all without a *final* judicial determination of obscenity." 306 F. Supp., at 1028.

The judgments of the three-judge courts in Nos. 55 and 58 are

Affirmed.

MR. JUSTICE BLACK concurs in the result.